

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CONTOUR IP HOLDING, LLC and ION WORLDWIDE, INC., v.))) Plaintiffs,)) C.A. No. 15-1108-LPS-CJB
GOPRO, INC.))) Defendant.	[REDACTED]
)	REDACTED - PUBLIC VERSION

**UNOPPOSED MOTION TO REDACT LIMITED PORTIONS OF THE
APRIL 19, 2016 HEARING TRANSCRIPT**

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Dated: May 31, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CONTOUR IP HOLDING, LLC and ION WORLDWIDE, INC., v. GOPRO, INC.)))) Plaintiffs,))) Defendant.)	C.A. No. 15-1108-LPS-CJB CONFIDENTIAL – FILED UNDER SEAL
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**UNOPPOSED MOTION TO REDACT LIMITED PORTIONS OF THE
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Plaintiffs Contour IP Holding, LLC (“CIPH”) and iON Worldwide, Inc. (“iON”) (collectively, “Plaintiffs”), by and through their undersigned counsel, pursuant to Rule 5.2 of the Federal Rules of Civil Procedure and this Court’s policy on the electronic availability of transcripts of court proceedings, hereby move for an Order redacting certain highly confidential portions of the hearing transcript from the hearing held on April 19, 2016 (D.I. No. 41). Plaintiffs’ proposed redactions are narrowly tailored and apply only to particularly sensitive confidential information relating to private negotiations between iON and third-party Contour, LLC and between iON and CIPH. There is no public benefit to making this confidential information publicly available. Thus, for the reasons set forth below, Plaintiffs respectfully request that the Court grant Plaintiffs’ motion to redact the hearing transcript with respect to Plaintiffs’ and Contour, LLC’s confidential information. Pursuant to D. Del. LR 7.1.1, counsel for Plaintiffs has conferred with counsel for Defendant GoPro, Inc. (“GoPro”), and GoPro does not object to the redaction of information.

I. BACKGROUND

The Court held a hearing on April 19, 2016 to hear oral argument on two GoPro motions to stay—one motion to stay pending *inter partes* review of some of the patent claims and the other relating to Federal Rule of Civil Procedure 41(d)—as well as to conduct a scheduling conference. During the argument on the motions, the Court requested information regarding the status of iON and Contour, LLC’s merger. Certain portions of the hearing transcript relating to the merger relate to confidential communications and negotiations between iON and third-party Contour, LLC and between iON and CIPH.

The official transcript of the hearing was filed on April 29, 2016, and Plaintiffs filed a notice of intent to redact material on May 20, 2016. The Court set the deadline for submitting redaction requests as May 31, 2016. Attached as exhibit A is a copy of portions of the transcript with the proposed redactions highlighted, and attached as Exhibit B is a redacted copy of the full transcript.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 26(c) provides that a protective order may be entered for good cause, including “requiring that a trade secret or other confidential . . . commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). Likewise, Rule 5.2(e) allows a court to require redaction of additional information or limit or prohibit a nonparty’s remote electronic access to a document filed with the court.

To determine whether “good cause” to seal exists, a court may look to a number of things, including (1) whether disclosure will violate any privacy interests; (2) whether the party benefiting from the order of confidentiality is a public entity or official; and (3) whether the case involves issues important to the public. *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995). “[I]f a case involves private litigants, and concerns matters of little legitimate public

interest, that should be a factor weighing in favor of granting or maintaining an order of confidentiality.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994).

The Third Circuit has explained that good cause to seal a transcript “is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure.” *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F. Supp. 866, 890 (E.D. Pa. 1981)).

III. ANALYSIS

Here, Plaintiffs seek a narrowly drawn protective order to cover only confidential information relating to private negotiations between iON and third-party Contour, LLC and between iON and CIPH. Rather than try to seal information about the merger of the two and the licensing negotiations generally, Plaintiffs seek to redact specific information related to the negotiations taking place since the merger was made public. See D.I. 41 at 51:6-8, 52:2-8, 57:14-21 (attached as Exh. A).

There is no public interest in publicly providing the information Plaintiffs request to be sealed, let alone any strong public interest. Indeed, this case involves private litigants and not public figures, weighing in favor of maintaining confidentiality. *Pansy*, 23 F.3d at 788. There is no benefit to the public in knowing about the private negotiations between iON and Contour, LLC or between iON and CIPH. And Plaintiffs’ and Contour, LLC’s confidential negotiations has nothing to do with public health or safety, factors that might otherwise weigh in favor of public accessibility.

On the other hand, there is a specific and serious potential for harm to Plaintiffs and Contour, LLC if their confidential information is disclosed. The portions Plaintiffs request to redact contain information not publicly available and intended to remain in confidence as Plaintiffs and third party Contour, LLC work to resolve their separate disputes. Plaintiff iON and

Plaintiff CIPH, which is co-owned by iON and Contour, LLC, would therefore be put at a disadvantage if the public became aware of the extent and nature of the negotiations between iON and Contour, LLC and between iON and CIPH before such agreement is final.

Plaintiffs have made every attempt to keep their proposed redactions limited to only the most sensitive information. Plaintiffs' proposed redactions do not prejudice GoPro or obscure the thrust of the stay motion arguments from the public. Plaintiffs therefore submit that they have shown the requisite "good cause" under Rule 26(c) for sealing those portions of the transcript relating to the Plaintiffs' and third-party Contour, LLC's private communications and negotiations.

IV. CONCLUSION

Plaintiffs respectfully request that this motion to redact certain confidential information regarding Plaintiffs and Contour, LLC's private communications and negotiations be granted.

Respectfully submitted,

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Dated: May 31, 2016

EXHIBIT A

**REDACTED IN
ITS ENTIRETY**

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CONTOUR IP HOLDING, LLC,)
And iON WORLDWIDE, INC.,)
)
 Plaintiffs,) C.A. No. 15-1108-LPS-CJB
)
v.)
)
GoPRO, INC.,)
)
 Defendant.)

Tuesday, April 19, 2016
1:30 p.m.
Courtroom 2A

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE CHRISTOPHER J. BURKE
United States District Court Judge

APPEARANCES:

SHAW KELLER, LLP
BY: KAREN ELIZABETH KELLER, ESQ.

-and-

ROPES & GRAY, LLP
BY: PAUL M. SCHOENHARD, ESQ.
BY: NICOLE M. JANTZI, ESQ.
BY: IAN BROOKS, ESQ.

Counsel for the Plaintiffs

1 APPEARANCES CONTINUED:
23
4 MORRIS, NICHOLS, ARSHT & TUNNELL, LLP
5 BY: JACK B. BLUMENFELD, ESQ.
6 BY: MICHAEL J. FLYNN, ESQ.

7 -and-

8 DUANE MORRIS, LLP
9 BY: KARINEH KHACHATOURIAN, ESQ.10 11 12 Counsel for the Defendant
13 14 15 16 17 18 19 20 21 22 23 24

1 THE COURT: Counsel, before we
2 begin, let me just say a few things for the
3 record here. The first is that we're here today
4 in the matter of Contour IP holding, LLC, et
5 al., versus GoPro, Incorporated. That's civil
6 action number 15-1108-LPS-CJB here in our court.
7 And we're here for oral argument on two pending
8 motions, two motions to stay, one in favor of
9 IPR proceedings and the second relating to
10 Federal Rules of Procedure 41(d). And in
11 addition we're here to hold a case management
12 conference in the case.

18 MS. KELLER: Good afternoon, Your
19 Honor. Karen Keller from Shaw Keller on behalf
20 of the Plaintiffs, Contour IP Holding, LLC, and
21 iON Worldwide, Inc. With me today from Ropes &
22 Gray are Paul Schoenhard, Nicole Jantzi and Ian
23 Brooks.

24 THE COURT: Welcome to you all.

All right. And for Defendant's side.

2 MR. BLUMENFELD: Good afternoon,
3 Your Honor. Jack Blumenfeld from Morris Nichols
4 for GoPro. And with me at counsel table are
5 Karineh Khachatourian of Duane Morris in Palo
6 Alto and Michael Flynn from Morris Nichols. And
7 with Your Honor's permission, Ms. Khachatourian
8 will be arguing today.

9 THE COURT: Thank you. Welcome
10 counsel from near and far. All right. What I
11 thought we would do is to hear, as I think I
12 suggested in my oral order is to hear oral
13 arguments on the motions first and I've
14 allocated 45 minutes per side to each side with
15 regard to those two motions. Then I'll likely
16 take a short break and come back out and we can
17 address kind of the case management conference
18 portion of this hearing. I should also tell you
19 that I'm our criminal duty judge this week and I
20 expect that there's going to be a brief criminal
21 matter that I will likely have to address
22 somewhere in the midst of what we're doing. My
23 hope is it will kind of come about around the
24 time when we're going to take a break between

1 these two portions, but it's a matter that would
2 have to proceed under seal and so either if it
3 comes naturally during our break that these
4 parties are ready or if they are ready
5 beforehand, at some point I'll have to ask the
6 parties to leave the court room while we take a
7 short break so I can handle that matter. I
8 doubt it will take any longer than 5 or 10
9 minutes, but I just want to keep you apprised of
10 that, okay?

11 I know there's two motions, which
12 are different motions, but in light of their
13 size, I think it makes sense for me to here
14 argument from the movents as to both motions
15 kind of in order, whatever order you want to
16 take them. Then I'll hear a response from the
17 respondent as to both and then any rebuttal that
18 the movent wants to make instead of having two
19 separate times to have the parties get up and
20 sit down for motion practice.

21 Other than that, I think both
22 motions are Defendant's motions and so I call on
23 counsel for Defendant to come forward and begin,
24 Ms. Khachatourian. And I think I've allocated,

1 as I said, 45 minutes percent side. What I'll
2 do is ask my law clerk to let me know when you
3 have 10 minutes left and let you know, that way
4 you can be sure to save any time you need to.

5 MS. KHACHATOURIAN: Thank you,
6 Your Honor. I appreciate it. At the outset, I
7 wanted to make clear for both motions that I do
8 not think iON needs to be considered in the
9 disposition of either motion. Activities have
10 occurred since the briefing of these motions
11 that I think the Court needs to be aware of. As
12 I understand it, iON is not an exclusive
13 licensee to the patents in suit and therefore
14 iON does not have standing to be a co-plaintiff
15 in this suit. We have asked Plaintiff's counsel
16 for the basis for why iON has standing in this
17 case. They haven't responded to us. We had
18 asked for certain corporate documentation so
19 that we could more fully understand the
20 relationship between Contour and iON. Some
21 documentation was provided where those who have
22 reviewed it on Defendant's side doesn't see why
23 iON would be legally required to be a
24 co-plaintiff. We've asked for supplemental

1 documentation and we haven't received a
2 response.

3 The second reason why iON
4 shouldn't be considered here is because they
5 didn't oppose. They didn't file any opposition
6 to either the 41(d) motion or the motion to stay
7 pending IPR; therefore, if the Court were to
8 rule that GoPro is entitled to costs and fees
9 under 41(d), since iON didn't oppose, we think
10 there should be a ruling in favor of GoPro
11 vis-a-vis iON because they didn't oppose and the
12 same with the motion to stay pending
13 reexamination.

14 THE COURT: Just real quickly on
15 those two issues. As to the standing issue, do
16 you understand that to be opposed? You believe
17 iON has standing, you don't believe it's an
18 exclusive licensee? Do you understand the other
19 side to be opposing that view, that this is a
20 contested issue at least as of now?

21 MS. KHACHATOURIAN: That is not my
22 understanding.

23 THE COURT: Oh, you think it's
24 undisputed?

1 MS. KHACHATOURIAN: That is my
2 understanding, yes. I think that's probably a
3 question that you might want to pose to them.
4 But that's my understanding that there is no
5 dispute to the fact that they are not an
6 exclusive licensee. And in fact, I believe it
7 was February 19th, the day the oppositions were
8 due to the motions that GoPro filed, Contour
9 filed an amended complaint basically withdrawing
10 iON from the pleading and stating that they had
11 not paid license fees and therefore were no
12 longer an exclusive licensee and withdrew iON
13 from the case. And I believe then the following
14 Monday they withdrew their amended complaint.
15 After that, I have had discussions with
16 Plaintiff's counsel who, I believe, has
17 confirmed that they are presently not an
18 exclusive licensee and that that license has
19 been terminated.

20 THE COURT: Okay. Certainly if I
21 forget, I'll ask Plaintiff's counsel to remind
22 me to address with Plaintiff whether that issue
23 is disputed and whether, in fact, iON is
24 asserted to be an exclusive licensee or not. I

1 guess if it were disputed and if iON were still
2 in the case, I guess on what basis would I have
3 when I resolve these motions, not to consider
4 their presence prior to say the adjudication of
5 a motion to dismiss for lack of standing? In
6 essence, wouldn't you being having me decide
7 that kind of a motion to dismiss without
8 briefing or argument if this were, in fact, a
9 disputed issue and if they were at least
10 technically still a party in the case?

11 MS. KHACHATOURIAN: Your Honor, I
12 think if the Court believes that a motion to
13 dismiss based on lack of standing were necessary
14 to adjudicate that issue, then yes, I would
15 agree with you that that's what I would be
16 asking you to do. But here, with respect to the
17 motion for costs, it doesn't really matter,
18 because they didn't oppose. The reason the
19 status matters is because Contour is arguing
20 that iON is a different party than the parties
21 before and there's analysis about that that I'll
22 get into. So if the Court believes it needs
23 additional information before it can make that
24 determination based on the open questions, if

1 there are any, then yes, Your Honor, I would
2 agree with you, but I don't think that's the
3 case here.

4 THE COURT: And then they didn't
5 file an opposition. Am I right, that it looks
6 like from the documents because the day they
7 didn't file an opposition when it was due, they
8 also filed the amended complaint to take iON out
9 of the case? Grant you, subsequently we have
10 this notice of withdrawal that came into play.
11 I understand that is unusual. We'll get into
12 that. That's what happened, right? That's why
13 they didn't file something, because they took
14 iON out of the case on the day the motion was
15 due to be responded to; is that correct?

16 MS. KHACHATOURIAN: I don't know
17 if that's the reason. Unfortunately, you're
18 going to have to ask them. I would just be
19 guessing. But what I will say as an attorney,
20 if the other side points out that an opposition
21 has not been filed, other than feeling sick to
22 my stomach and finding out, you know, what the
23 issues are, if I was going to file an opposition
24 after receiving that notice, I would, in fact,

1 file one and I would beg for the Court's mercy.

2 THE COURT: Okay.

3 MS. KHACHATOURIAN: So it does beg
4 the question as to what the situation is here
5 because we actually also filed -- it was a
6 notice. It wasn't phrased a notice of
7 non-opposition, but it essentially was a notice
8 to the Court that no opposition was filed and
9 therefore we had asked for an order in our favor
10 vis-a-vis iON. And there was no response to
11 that notice either. So there's, you know --
12 there are two opportunities where if they wanted
13 to file an opposition, they could have. And
14 counsel is present day, and they announced that
15 they are counsel for both iON and Contour, so if
16 they wanted to file something, they obviously
17 could have. And the Contour papers did not
18 include any mention that it was on behalf of
19 iON, but our motion specifically stated that our
20 motions were against both parties.

21 THE COURT: Okay. Why don't we
22 press on?

23 MS. KHACHATOURIAN: Okay. Thank
24 you very much, Your Honor. I think I'm going to

take the, if it pleases the Court, the motion to stay pending IPR first.

THE COURT: Sure.

MS. KHACHATOURIAN: The reason for

that is if the Court were to agree with GoPro and grant the stay, then the issues with respect to the 41(d) motion could be deferred, because the case would be stayed. And that may be practical to the Court, because I suspect knowing that the Court has read the papers, that the Court is wondering about the difference between Huntley and Garza in this jurisdiction. And the Garza case is actually up on interlocutory appeal right now. I did check the status. I hadn't seen anything new. But based on the memorandum certifying the interlocutory appeal, Judge Robinson did state that she was granting -- she was certifying it for interlocutory appeal because she saw that there were substantial grounds for a difference of opinion as to its correctness. She also acknowledged that the issue had not been resolved by the Third Circuit and she felt that it was better to stay the case because there had

1 already been a stay in place to wait for the
2 appeal to be concluded. I'm fully prepared to
3 discuss all those issues when we address 41(d),
4 but I did want to raise that with the Court
5 outright, that if you were to grant the motion
6 to stay pending IPR, the 41(d) issue could be
7 deferred at which point the Third Circuit may
8 have spoken by the time the IPR is concluded in
9 October.

10 THE COURT: And so the current
11 status in Garza is that Judge Robinson certified
12 the case for interlocutory appeal, the Third
13 Circuit has accepted the case.

14 MS. KHACHATOURIAN: Sure.

15 THE COURT: It's in the course of
16 briefing. Or is it pending a decision?

17 MS. KHACHATOURIAN: My
18 understanding it's in the course of briefing. I
19 don't know anything more than that.

20 THE COURT: So practically -- and
21 I know this relates to the Rule 41 issue, not
22 the issue you're starting with, but since you
23 mention it. We have a situation where we're
24 pretty sure we're going to get a binding

1 decision from the Third Circuit at some point
2 within the next number of months on the
3 attorneys fees issue; is that right?

4 MS. KHACHATOURIAN: That is
5 correct.

6 THE COURT: That wouldn't
7 necessarily -- well, let's talk about -- when we
8 get to Rule 41, let's talk about whether -- you
9 know, because one of the questions is going to
10 be, why would you say anything about that issue
11 if you knew the circuit to which you were going
12 to follow was about to decide it? But maybe we
13 can talk about whether there are other aspects
14 of that motion, even if I was uncertain about
15 whether I should maybe wait for the Third
16 Circuit on that question that could be decided
17 in the short term, but why don't we start with
18 the IPR stay request.

19 MS. KHACHATOURIAN: Thank you,
20 Your Honor. I think it's helpful to start with
21 the timeline of this case. And to the extent
22 this is duplicative of anything, Your Honor,
23 please just interrupt me because I don't mean to
24 duplicate. But I thought it was important to see

1 it in context, because the patterns here are
2 relevant to why a motion to stay pending IPR
3 should be granted given what the Plaintiff's
4 opposition is to GoPro's motion.

5 This case was originally filed in
6 November 2014, and Contour LLC, on the same
7 patent suit, Camp Saver, which is a small mom
8 and pop store in Utah. In January 2015, GoPro
9 was added. I had a conversation with Contour's
10 counsel at that time, who had said to me that
11 Camp Saver was sued for jurisdictional reasons
12 to keep the case in Utah because you had a Utah
13 plaintiff, you have GoPro who is not in Utah and
14 is a Delaware corporation whose business is
15 really the centers in California. And that was
16 stated to me unequivocally.

17 THE COURT: Just to stop for a
18 second. I think what you're saying is that you
19 had a conversation with opposing counsel in
20 which they admitted the only purpose, the only
21 reason to include a party in a litigation was to
22 secure venue. And that's an issue that's
23 relevant to the motions, but what you're saying
24 right now isn't a part of the record, is it or

1 is there some --

2 MS. KHACHATOURIAN: It is
3 actually, Your Honor.

4 THE COURT: Okay.

5 MS. KHACHATOURIAN: So, that
6 conversation is memorialized in a pleading that
7 was subsequently filed in Utah and is attached
8 to our request for judicial notice, so it is my
9 understanding that it is.

10 THE COURT: Okay. Do you happen
11 to know where -- let me ask you maybe
12 during -- well, to the extent there's some kind
13 of declaration or it's equivalent as to that
14 admission, you can point it out on me before we
15 leave today.

16 MS. KHACHATOURIAN: I will do so.

17 THE COURT: Thank you.

18 MS. KHACHATOURIAN: GoPro filed
19 its IPR's in the patents in suit in April of
20 2015, so we did it very quickly. Actually,
21 frankly, incredibly quickly. GoPro moved to
22 dismiss in April of 2015 as well, on April 27th.
23 Contour LLC and GoPro then stipulated to stay
24 the Utah action. It was a joint motion, it was

1 agreed to on April 27th. The Court ruled on
2 that motion on May 4th. So the Utah case was to
3 be stayed until the motion to dismiss was heard.
4 That motion, subsequently to that order several
5 months later, was calendared for January 12th,
6 2016, to be heard. So there was essentially an
7 8-month stay until the case was dismissed and
8 filed here in Delaware.

9 THE COURT: Was the idea that it
10 was to be decided on that day as well or that
11 that decision may also have still been pending
12 and might have extended the stay?

13 MS. KHACHATOURIAN: The latter,
14 Your Honor.

15 THE COURT: Okay.

16 MS. KHACHATOURIAN: And the order
17 is in the documents that we submitted to the
18 Court. In June Contour IPH, the holding company
19 that is now the Plaintiff in this case, was
20 formed. So while the case was stayed, shortly
21 thereafter, this entity was formed. Case is
22 stayed. November 23rd, 2015, the patents are
23 assigned to this new entity, so there is a break
24 in time, right? They decide to form this entity

1 in June, but they don't assign the patents until
2 November 23rd. November 23rd happens to be the
3 date that GoPro filed their motion to stay
4 pending IPR in Utah. The reason why GoPro did
5 that was two-fold; one, because Contour would
6 not agree to extend the stay pending the IPR
7 decision and two, we can't delay. If we had
8 waited in filing the motion, I'm sure we would
9 hear today that GoPro delayed and that we
10 brought the motion for a tactical advantage,
11 because that is one of the arguments you hear if
12 you wait too long. So that is why we filed the
13 motion to stay pending reexam when we did. A
14 week later, unbeknownst to us, Contour dismisses
15 the Utah action abruptly, out of nowhere and
16 then refiles here in the same day. Does not
17 answer the motion to stay. We never go to
18 hearing in January and the stay is extinguished
19 by virtue of the dismissal. When the suit was
20 refiled here we asked Contour to stipulate to
21 the stay and they refused. They did offer us a
22 longer time to answer, but they refused to agree
23 to a stay.

24 Believing that this is the same

1 action that's refiled, we send a demand letter
2 on December 18th, which was never responded to.
3 The hearing never went forward in Utah. We
4 filed our motions. February 19th oppositions
5 were due. We got the amendment to the complaint
6 now taking iON out of the case, only for that to
7 be reversed a couple days later. The IPR
8 hearing is June 22nd and the Board must rule by
9 October 28th.

10 These set of facts are important
11 to I believe see in contact to sort of
12 understand the pattern here and why GoPro feels
13 strongly about the motions and why they filed
14 them.

15 With respect to the motion to stay
16 pending IPR there's really a few arguments that
17 I could see that the Plaintiff makes as to why
18 it should not be stayed. The first one, they
19 don't disagree that we are in the early stage of
20 the case, so you can check that off. Clearly
21 nothing happened in Utah and nothing is really
22 happening here other than these motions and the
23 scheduling conference, so I don't think there's
24 any dispute that we're in the early stage of the

1 case here. They oppose the idea that staying
2 the case will simplify the issues. Their I
3 think largest argument or the argument that I
4 think they make most -- that's mostly out there
5 is that well, they cite these line of cases that
6 talk about, you know, the order's going to come
7 out from the Board in a couple months, so
8 there's no point in staying now. I believe one
9 of the cases is Nexus. And so you know, we're
10 not going to stay it right now, because there's
11 not really going to be a lot of waste here, it's
12 not going to be a simplification. But those
13 cases don't have the facts as they appear here.

14 Essentially GoPro asserts that
15 what Contour has done here is this was all in
16 their control. They decided to create a new
17 entity when they did. They decided to assign
18 the patents. They decided to merge or not merge
19 with iON. They decided to get into a license
20 agreement or not with iON. All of these things
21 were within their control. And for them to
22 avoid a hearing in January where a motion to
23 stay would have been heard and refile here and
24 force us to have to file the motion to stay

1 again and say oh, well, now we're getting closer
2 to the hearing and we're getting closer to the
3 order, so we basically created this situation.
4 And so, you know, to reward them for that
5 procedural posture I think is sending a really
6 dangerous message if the Court were to say well,
7 it's not going to simplify the issues given the
8 timeline here that you're hearing is in June and
9 the PTAB is going to rule in October, because
10 that is one of Contour's own making. They
11 skirted the stay. They -- you know, everything
12 was within their control and to stand here now
13 and say well, the IPR is almost done, so we
14 should just move forward really doesn't get to
15 the core of the simplification of issues problem
16 to begin with.

17 THE COURT: In terms of the the
18 equities of it, you know, look, they ended up
19 filing this new case and by the time this issue
20 is now percolating in the second court or closer
21 to the decision, they shouldn't be rewarded for
22 that?

23 MS. KHACHATOURIAN: Correct.

24 THE COURT: I guess about that,

1 they did also buy themselves kind of a certainty
2 of a number of months of additional delay,
3 right? I mean, because they filed a new case
4 and again, you know, it's different Plaintiffs,
5 but I know you're putting together these groups
6 of Plaintiffs, they kind of assured themselves
7 nothing is going to happen on their case until
8 at least, you know, what ended up being, you
9 know, April of 2016. Why wouldn't, you know,
10 why wouldn't that, that kind of burden that they
11 kind of took on kind of help mitigate the
12 equities a little bit in light of the, you know,
13 the assertion you're making, which is I should
14 consider the equities, don't give them a
15 windfall by deciding this in their favor in this
16 Court?

17 MS. KHACHATOURIAN: But it doesn't
18 balance the equities. And the reason for that
19 is that they're getting exactly what they want.
20 That delay, that several months, the case was
21 already stayed in Utah. There would have been a
22 hearing in January. That stay would not
23 extinguish until the Utah court ruled. So
24 they're not winning or losing anything in terms

1 of filing in a new jurisdiction where there
2 would be some inherent delay.

3 Moreover, they did not request
4 that we respond initially in the normal, I
5 believe it's hopefully 21 days -- I think
6 California is 30 -- in the 21 days. They were
7 willing to give us 180 days. So delay wasn't
8 really a concern for them. If they wanted to be
9 a very active plaintiff and were concerned about
10 the delay in Utah and coming to Delaware, they
11 wouldn't have given us all, you know, all of
12 that time to respond. It really wasn't an issue
13 for them.

14 So that begs the question, why?

15 And given the pattern and given the timeline, I
16 believe and GoPro believes that filing here
17 would get them closer to the decision to avoid a
18 longer stay.

19 THE COURT: On simplification, if
20 I'm trying to figure out, you know, the basic
21 argument, the traditional, you know,
22 simplification argument with respect to IPR
23 motions to stay is, you know, if the case were
24 not to be stayed first, is it likely that the

1 Court is going to have to engage in any work
2 between now and October if the case weren't
3 stayed that it wouldn't have to engage in if the
4 case were stayed? For example, Plaintiff's note
5 that the claim construction process here even
6 under their proposals doesn't begin to get
7 started until October of this year, so briefing
8 doesn't happen until early 2017. From the Court
9 perspective, isn't it probably the case that
10 there isn't likely to be Court expended,
11 identifiable Court expended resources that
12 would, that would get expended if the case
13 weren't stayed?

14 MS. KHACHATOURIAN: Your Honor, I
15 think that there would probably be a multitude
16 of discovery disputes between the parties that
17 the Court would have to engage in, particularly
18 given this corporate structure where CIPH is now
19 contending in one opposition and in the
20 scheduling papers that Contour LLC is a third
21 party, for example, but when facing this motion
22 to stay, they're saying that Contour LLC would
23 be prejudiced if a stay were granted. So I
24 think that there would be multiple of discovery

1 disputes, for example, not to mention the burden
2 that GoPro would have to go to in terms of, in
3 terms of having to produce discovery, putting
4 three people through depositions. The core of
5 the case concerning discovery is probably the
6 most expensive there is for Defendants. And
7 Plaintiff has already stated that the discovery
8 is going to be somewhat broad. Also, there's
9 going to be that standing motion, and there may
10 also be a motion to transfer.

11 THE COURT: Now, as to all of
12 those things, if we take at face value
13 Plaintiff's assertion that they do intend to
14 assert at least some if not all of the claims
15 not at issue in the IPR, if I were to say to you
16 well, with regard to either discovery-related
17 work or motion-related work of the kind you're
18 citing, if you take Plaintiff's assertion at
19 face value, why wouldn't the Court ultimately be
20 engaging in those kind of, that kind of work one
21 way or the other in the case? Or put
22 differently, what is something that clearly
23 would not -- what is something that would happen
24 in the next six months that clearly would not

1 happen, depending on what occurs in the IPR, if
2 the IPR went a certain way?

3 MS. KHACHATOURIAN: I think the
4 best way to answer that question is to talk
5 about the claims that were not subject to the
6 IPR. The '694 Patent, all the claims are before
7 the Board. On the parent patent, the '954, 23
8 of the 30 claims are before the Board. The
9 others -- the seven other claims are means plus
10 function claims. And essentially what would
11 happen is if those claims were to move forward,
12 Your Honor, they are the same as the other
13 claims that are before the Board, except they
14 have to correspond to a structure. That's the
15 whole point of the means plus function claims.
16 But it's the same concepts, it's the same -- it
17 describes the same invention. It's no different
18 from the claims that are before the Board. And
19 in fact, if all of these claims are held
20 invalid, it is going to be very difficult, if
21 not impossible, for Contour to raise these
22 claims in this case. So you actually, the Court
23 would be doing work that it wouldn't have to do
24 if it waited for the PTAB.

1 THE COURT: Assuming they would
2 drop the seven claims if they got a decision as
3 to the others that they were invalid?

4 MS. KHACHATOURIAN: It's GoPro's
5 assertion that they would have to. These are so
6 closely related.

7 THE COURT: I still don't
8 understand your point as to look, there's a lot
9 that might come out as to the other 23 claims
10 that could inform what's going on with respect
11 to those seven claims. For example, I think you
12 noted if there are terms in common, if we're
13 likely to get some, some input on invalidity
14 issues that are at least somewhat related to the
15 seven claims. But you know, I guess again,
16 taking at face value that they intend to go
17 forward with these no matter what, I'm trying to
18 figure out, what work is likely to be done by
19 the parties or the Court in these six months
20 that wouldn't have to be done? For example, I
21 think you would say, look, at a minimum --

22 MS. KHACHATOURIAN: Invalidity
23 contentions.

24 THE COURT: We'll be dealing with

1 some number of claims that could be out of the
2 case. Is there anything else like that, if it
3 went your way totally in the IPR surely this
4 would be duplicative?

5 MS. KHACHATOURIAN: Sure. There's
6 infringement contentions that they have to do.
7 We have to respond to that. We're going to get
8 the interrogatories that ask for our entire
9 invalidity case as well as our non infringement
10 position. Infringement doesn't matter if your
11 claims aren't valid, so why do all of that up
12 front work now? Delaware has process where this
13 is concerned, where you exchange early
14 information, you exchange information about the
15 accused devices and you provide technical
16 material. They have already said that they
17 probably want to see our source code, which is
18 something that companies guard. There are all
19 of these things that are going to breed dispute
20 and they are going to cause a lot of work, not
21 just for the parties, but for the Court.

22 I mean, I think it's important to
23 point out that the '954 is the parent of the
24 '694 and the only true difference between them

1 is the '694 has, what do you call that, where
2 you can hang it up? It has an apparatus, a -- I
3 want to be completely clear on this. It has a
4 hanging apparatus so that you can mount -- a
5 mounting apparatus. That's the only difference
6 between the two patents. These are closely
7 related patents. They share the same
8 specification. Other than this one minor
9 detail, they are essentially the same. And I'm
10 happy, if it pleases the Court, to go through
11 these means plus function claims to point out
12 how similar they are to the actual other
13 independent and dependent claims that are before
14 the U.S. PTO right now. It talks about, you
15 know, preview, streaming, video and high and low
16 resolution. I mean, all of the elements that
17 are up at the Board right now are the same
18 elements that will affect these claims.

19 THE COURT: Yeah. My only point
20 is that, you know, it can cut both ways. In
21 other words, I give you that there are lots
22 of -- because there have more similarities, lots
23 of expected simplification from a PTAB decision
24 as to related claims for sure, but if the

1 Plaintiff can say somewhat convincingly, we're
2 going forward as to these seven regardless, so
3 they are going to have to produce the same docs
4 about the same accused products. They are going
5 to have to largely, you know, deal with
6 depositions, deal with responses to requests for
7 production interrogatories in the case one way
8 or the other. Then the question is, well, you
9 know, why stay it if we're likely to get a
10 decision before claim construction really gets
11 started? Now, if claim construction was, you
12 know, half way done or, you know, all the way
13 done, that might be different because you can
14 easily see the Court's resources could be
15 utilized there in a way that could be wasted.
16 And I think you responded in part by saying
17 look, we're dealing with contentions, we're
18 going to be dealing with responses relating to
19 those, to interrogatories in request for
20 production. Anything else that you would point
21 to in terms of wasted work?

22 MS. KHACHATOURIAN: I would point
23 to a few things. As I said, those motions that
24 wouldn't be filed.

1 THE COURT: Why would those
2 motions not be filed?

3 MS. KHACHATOURIAN: If the case is
4 stayed, we're not going to file a motion to
5 dismiss for standing. If the case is stayed,
6 we're not going to file a motion to transfer
7 right now. I mean, the case is going to be
8 stayed. If they are ruled invalid, the case is
9 most likely over.

10 THE COURT: What I'm asking,
11 though, is not what you would file were the case
12 stayed. What I'm asking is would they
13 be filed were the case to end up going forward
14 as to the other seven claims?

15 MS. KHACHATOURIAN: Those motions
16 aren't claim dependent, right? I mean, so they
17 are procedural motions. But I would submit to
18 the Court that this case was filed in Delaware
19 after the PTAB instituted IPR and after the
20 decision was offered. The decision was offered
21 in October of last year. One month later,
22 almost to the day, this case was filed. Nowhere
23 in the complaint, I don't believe, they alleged
24 these means plus function claims that they're

1 going to assert against GoPro. The first that I
2 believe I became aware of it, and if I'm
3 mistaken, then I'll be corrected, is when it was
4 in the opposition to the motion to stay.

5 So knowing means plus function
6 claims and knowing how difficult they are to
7 pursue and knowing how related they are to the
8 other claims that are already in the IPR, you
9 almost have to think of it as if even though the
10 Board didn't institute on those seven claims, it
11 almost is a distinction without a difference.
12 Because depending -- the Board's ruling will
13 impact these claims. And so this situation
14 really is no different from any other where
15 folks move for a motion to stay pending IPR.
16 You need to think of it as all of the claims
17 were instituted. That's how closely related
18 they are.

19 And if they were to file against
20 us on those claims, that would have been done a
21 long time ago. This case was originally filed
22 in 2014 against Camp Saver and early 2015
23 against GoPro. So it begs the question why all
24 of a sudden now when you're faced with an

1 opposition to a motion to stay that you're going
2 to assert that you're going to assert it against
3 us. How are they going to assert it against us?
4 I'd love to hear it, because where I stand I
5 think that is going to be a very uphill battle
6 and the Court is going to waste a lot of time
7 and so are the parties in doing discovery on
8 these claims and doing invalidity contentions
9 and doing infringement contentions and basically
10 responding to interrogatories and, you know,
11 motion to compel disputes and all the rest of
12 that. This is the meat of the case right now.
13 We're at a crossroads. If you don't order the
14 stay, everything is going to begin. And so then
15 it doesn't matter if claims construction is
16 after the ruling. All of the hard work and all
17 of the expense is going to happen now and so
18 that's why a stay is appropriate. The fact that
19 seven out of how many claims, you know, seven
20 out of maybe 40 claims wasn't instituted, if you
21 look at the case law in Delaware and outside,
22 you don't -- you don't have to -- there doesn't
23 have to be a complete overlap. That's not
24 required.

1 And so if there was ever a
2 compelling case to grant a motion to stay, not
3 just because of the stage of the proceedings
4 and, you know, the decision to institute and how
5 many claims. I mean, this isn't a situation
6 like some of the cases that Plaintiff cited
7 where there are whole patents that people didn't
8 move on that didn't institute. You know, one
9 claim was asserted and you didn't seek PTAB
10 review for that one claim. We're talking about,
11 what, 93 percent of the claims are before the
12 PTAB right now. The patents are so closely
13 related. These seven claims are closely
14 related. It's all the same invention except for
15 this one small mounting distinction.

16 So essentially what the Plaintiff
17 is asking you to do is to start at the worst
18 part of a case, frankly, which is discovery and
19 invalidity contentions and producing source code
20 and doing all this stuff and then hearing from
21 the PTAB that the claims are invalid and then
22 what? You can't undo that. So okay, GoPro is
23 right. And everything that I say is going to
24 happen happens, and then I've spent half a

million dollars my client has and we're in all these disputes and we have to produce all of this incredibly sensitive information and that can't be undone. You know, so waiting basically creates prejudice for GoPro that can't be fixed.

So, okay, October 28th a ruling comes out for the PTAB invalidating everything. Then what? All that work is done, whereas on the opposite side, Contour won't be prejudiced because they've already waited all of this time to prosecute their case.

The Plaintiff in this case is an NPE. It is a holding company. When it's convenient for them they say oh, Contour LLC is a competitor in this motion, but then for the other motion they say they're not related. The bottom line is they are an NPE. They didn't file a motion for preliminary injunction. They have not moved at a very fast pace here and they stipulated to a stay initially for a very long time.

So while Contour can then continue its case at the end of October because if their claims survive, all of the work GoPro will have

1 to then go through can't be undone. So while
2 Contour can still do their case, if we do not
3 succeed at the PTAB or some of the claims
4 survive and then that case goes forward and it
5 will be simplified and everyone will know the
6 rules, here we're not going to get that half a
7 million dollars back. We're not going to get
8 our source code back, you know. We're going to
9 be put to that burden with no relief.

10 So that's why this situation is
11 ripe to stay the case, because what the PTAB
12 says will have implications across the board
13 where Contour, depending on how it goes, can
14 still move their case forward. But GoPro can't,
15 you know, can't take their source code back.
16 They can't take their depositions back. They
17 can't take any of that back. And you're putting
18 them to a burden and you're having them do
19 infringement analysis and do all of these things
20 when infringement is not even going to be an
21 issue if the patents are invalid.

22 THE COURT: Right. And we should
23 move on. All I'm saying is I see a lot of these
24 motions as I would do, the fact that it's a

little unique is because of the particular procedural circumstances here, going to get a decision from the PTAB necessarily in a much different and earlier, closer stage in time to when a case management conference is occurring as we often do, so that's all I'm saying.

MS. KHACHATOURIAN: I understand that, Your Honor. I will also submit and then I will move onto the 41(d) motion, that once we get that order, it's likely that Contour will appeal. Then what? Then does the case still continue? Do we come back and ask for another stay? By that time, I mean October is still -- what are we in April -- October, so six months, that's six months away and the Federal Circuit appeal will take some time. So why do all of this work up front for claims that maybe will be asserted, which frankly I submit will probably not be and have never been to begin with?

On the 41(d) motion, in addition to the attorneys' fees issue, whether 41(d) includes attorneys' fees, there were several other arguments that Contour made in opposition. The first that it's not the same parties. And

1 as we said in our papers there's nothing that
2 says it has to be the same parties, but also
3 they are the same parties. I mean just because
4 look, if it walks like a duck and quacks like a
5 duck, it's a duck. So you created a holding
6 company. You owned -- you were the Plaintiff
7 and owned -- Contour LLC owned 51 percent. Now
8 iON apparently owns 49 percent. Same patents,
9 same agents, same place of business. Just
10 because, you know, corporate shell game doesn't
11 mean it's the same parties, but it is the same
12 parties. But nonetheless, I mean Contour is
13 Contour, like I said. In the opposition to the
14 motion to stay pending IPR, they brought Contour
15 LLC into it and said Contour LLC would be
16 prejudiced. So okay, so then you're not the
17 same party? I'm not following.

18 THE COURT: Can I just ask on the
19 Rule 41 issue. I understand your point in terms
20 of, you say look, the rule, there were two
21 defendants, for example, out in Utah, one of
22 those two defendants has now sued here. I think
23 your point is there's nothing in the rule, the
24 rule says if a plaintiff brings in essence the

1 same suit against a defendant, nothing in the
2 rule you say requires that the plaintiff brings
3 the same suit against the defendant and every
4 other defendant that they happen to sue in the
5 other district?

6 MS. KHACHATOURIAN: Correct. And
7 also that just because you're changing name
8 doesn't mean you're not the same plaintiff.

9 THE COURT: Well, that's the one
10 I wanted to ask you a little bit more about.
11 And but if I look at the rule, which reads if a
12 plaintiff who previously dismissed an action,
13 dot dot dot, files an action based on or
14 including the same claim against the same
15 defendant, I guess the question is, it is
16 literally the case that this is not, that these
17 quote same plaintiffs that initiated the case in
18 Utah. I know your argument is that look, in
19 essence it is, you know, look at the contortions
20 they went through to make it a different
21 plaintiff, but if I'm looking at the rule and it
22 says a plaintiff, how do I -- how do I deal
23 with the argument that this is not the same
24 plaintiff, it's a different plaintiff? Albeit

1 one that's related to that plaintiff, but a
2 different entity.

3 MS. KHACHATOURIAN: Two fold.

4 First with respect to their admission in their
5 opposition to the motion to stay, where they say
6 Contour LLC would be prejudiced if a stay were
7 entered. If it was a different plaintiff, why
8 are you mentioning Contour LLC to begin with?
9 So that's number one. Number two, I think you
10 have to go back to the --

11 THE COURT: That's the motion to
12 stay regarding the IPR?

13 MS. KHACHATOURIAN: Correct.

14 THE COURT: You're saying look,
15 there they point to prejudice to Contour LLC, so
16 they are kind of acknowledging they're basically
17 the same entity?

18 MS. KHACHATOURIAN: Correct. And
19 then two, I think you need to look at the
20 purpose of the rule, which is stated, you know,
21 throughout all of the cases, including Garza,
22 which is this rule is put in effect to protect
23 defendants from having to defend the same action
24 twice. So that's a check here, right? You have

1 the same defendant, because defending the same
2 action twice. So then you just have the
3 Plaintiff proc. But this entire rule is
4 designed to protect against vexatious litigants
5 and forum shopping. And it would be, I believe,
6 a dangerous precedent to say because you changed
7 the name of this entity and created a different
8 corporate form that somehow you wouldn't be
9 called the same plaintiff any more. And by the
10 way, it's still got the name Contour in it. It
11 might be a different name, but they are still a
12 majority owner and all the rest of it, so --

13 THE COURT: So typically even if
14 related, corporate forms are respected in lots
15 contexts and supported in as to lots of motions.
16 And so I'm wondering, for example, is part of
17 your assertion that because Contour LLC merged
18 with iON and iON was, in fact, a plaintiff when
19 the case was filed that that has some bearing on
20 whether or not the same plaintiff filed this
21 case as did file the Utah motion?

22 MS. KHACHATOURIAN: It's unclear
23 whether iON and Contour merged. It really
24 depends on what you read. In one brief they say

1 they are partners. In another brief they say
2 they merged. There's press releases that they
3 say merged. The corporate documents don't
4 indicate as such.

5 THE COURT: What do the pleadings
6 say, the initial pleadings?

7 MS. KHACHATOURIAN: The pleadings
8 say they merged. That's my recollection.

9 THE COURT: Is your assertion that
10 a merged entity, iON merges with Contour LLC so
11 in essence for purposes of Rule 41, that's the
12 Plaintiff, the same plaintiff?

13 MS. KHACHATOURIAN: That's one of
14 our contentions. But the other is that even
15 though corporate formations are respected and
16 41(d) doesn't require bad faith, certainly in
17 your inherent authority and just generally, you
18 could find that it is the same plaintiff,
19 because there was a shell game going on, just
20 like with any other type of creditor case or any
21 other type of situation where if the purpose to
22 create this entity was to basically skirt around
23 trying to avoid this so that they could be in a
24 better forum. And I believe the complaint says

1 that they decided to file here for iON's
2 benefit, for iON's convenience because iON was a
3 Delaware corporation. And that's where iON
4 comes into play here, in that it doesn't appear
5 that iON should be a plaintiff in this case.
6 And therefore you can't really make the argument
7 that because iON is a co-plaintiff, it's not the
8 same plaintiffs. That was their argument in
9 their opposition, is that because iON is a
10 co-plaintiff, it's different plaintiffs. And
11 then they go on about CIPH versus Contour LLC,
12 but so then you just have CIPH and Contour LLC,
13 same agents, same everything, Utah company. I
14 don't think that those facts can be ignored in
15 terms of making an analysis of whether they are
16 the same plaintiff.

24 MS. KHACHATOURIAN: That's right.

THE COURT: I've got some case law, I think our Court does, typically when you hear forum shopping the thing that is kind of most prominent when that word gets thrown around is the idea that a party was refiling or filing in a different jurisdiction from where they were in order to avoid a Court's judgment or decision, one already issued or one likely to issue. What would be the evidence here that, in your view that I could look to what happened in Utah to say look, it's pretty clear that the reason why they dismissed and filed here is forum shopping in the sense that they were trying to avoid a decision that either had been issued or was likely to issue?

MS. KHACHATOURIAN: First it's the stipulated stay that became an order. There was an indefinite stay in place until the motion to dismiss was decided. There was also a motion to stay pending that was going to be heard January 12th. And I would submit to the Court that motions to stay pending reexamination in Utah are, are granted more readily than Delaware, for example. And so it's GoPro's assertion that

given the Camp Saver situation where we ended up in Utah -- and just to give you a little bit more background, Contour originally was based in Seattle, was a Washington company. And it got bought by Private Equity, which is based in Utah. And that's where Contour ended up being based. And then Contour sued Camp Saver first in Utah and then GoPro. GoPro is a Delaware corporation, principle place of business in California. So there was already this sense of forum shopping in the Utah case. And then according to Contour's papers, what they state is they came to Delaware for the convenience of iON. They say that in their complaint. iON is a Delaware company. They also say that it's better to be in Delaware because GoPro is a Delaware company as well. And they say that they got new lawyers. And iON is a Delaware corporation and they assigned the patents to this CIPH, so Contour LLC didn't own the patents any more and so a week after we filed the motion to stay, they filed in Delaware.

23 THE COURT: You think what
24 happened is they thought they were going to lose

1 the motion to stay pending IPR in Utah and
2 that's why they dismissed and you think the
3 record would bear it out?

4 MS. KHACHATOURIAN: Correct.

5 THE COURT: Okay. You're right
6 up against your time. I'll give you at least
7 five minutes for rebuttal. Any last point you
8 want to make briefly that you didn't get a
9 chance to make initially?

10 MS. KHACHATOURIAN: No, Your
11 Honor.

12 THE COURT: Okay. Thank you.

13 MS. KHACHATOURIAN: Thank you so
14 much.

15 THE COURT: All right. Let me
16 hear from counsel for the Plaintiff's side. Mr.
17 Schoenhard.

18 MR. SCHOENHARD: Yes, Your Honor.
19 Good afternoon.

20 THE COURT: Good afternoon to you.

21 MR. SCHOENHARD: Your Honor, today
22 I am -- my apologies.

23 THE COURT: No, that's okay.
24 Please continue.

MR. SCHOENHARD: Your Honor, today I'm appearing on behalf of both Contour IP Holding and iON Worldwide. You've heard quite a bit of argument over the last 45 minutes or so about some confusion as to what their respective roles are. I think it probably behooves me and the Court to go through that briefly and then enter our way back into the motions that are before the Court in a moment.

I think it's helpful probably to begin at the beginning of the story. At the closing of Ms. Khachatourian's argument, she referenced Contour's genesis in Seattle. Probably makes sense for us to start there at least briefly and I expect to move quickly through this.

Contour was started as an action camera company in Seattle. Very early in its years found strong competition from GoPro. They were readily considered to be two of the most formidable companies in the space. GoPro be it by dent of marketing or otherwise, I'm not a marketing expert here, but ultimately was prevailing in the marketplace and Contour was

1 not doing well financially. Contour ultimately
2 ended up in receivership. Contour was brought
3 out of receivership through Private Equity and
4 relocated itself into Utah. The two primary
5 assets of Contour were its intellectual property
6 portfolio that it had been developing throughout
7 its time and also its operating practices, its
8 operating company and its line of action
9 cameras, so its goods and also its IP. It
10 continued at that point to try to engage in
11 competition with GoPro or to resume competition
12 with GoPro. It had difficulty doing this in
13 part because in its view GoPro was continuing an
14 ongoing infringement of Contour's IP portfolio,
15 so Contour filed suit.

16 At this point we're referring to
17 Contour LLC. The corporate forms will matter as
18 we go along. That case was originally filed as
19 a case against Camp Saver, a Utah based company
20 that was filed at the end of 2014 in Utah.
21 GoPro was added into the case in early 2015. I
22 was not counsel in that case and I cannot attest
23 to Your Honor one way or the other regarding Ms.
24 Khachatourian's conversations that she may have

1 had with previous litigation counsel.

2 THE COURT: For what purpose
3 could Camp Saver have been added to the other
4 litigation other than to achieve a stronger
5 venue?

6 MR. SCHOENHARD: My general
7 understanding of the reason for suing Camp Saver
8 in the first instance was that they were a Utah
9 company that was selling into Utah products that
10 infringed. And what the ultimate plan had been
11 in terms of a litigation strategy, I am not
12 fully aware, but the reason or what would seem
13 reasonable to me is that you have one Utah
14 entity which would naturally have venue in Utah
15 where it's experiencing its personal harm. So
16 we had another Utah entity that it perceived as
17 an infringer directly in its Utah marketplace.

18 Thereafter, the suit brought in
19 GoPro a couple months later and as Ms.
20 Khachatourian pointed out, the suit was stayed
21 pending resolution of a motion to dismiss in
22 approximately May of 2015 when at that point
23 neither Camp Saver nor GoPro had answered the
24 complaint and there had been no substantive

1 proceedings.

Fast forward thereafter. At this point Contour is having some difficulty in the marketplace again and is looking for a marketplace partner. It finds iON Worldwide, a Delaware based corporation that is also in the wearable camera space. They are complimentary products, not exactly the same products, but complimentary products. iON was specializing in wearable cameras and Contour in action cameras and in iON, Contour saw a possible strong business partner that would then ultimately be responsible for manufacture and sales of Contour cameras going forward. They entered into an agreement with an intent to merge those two corporate entities, Contour LLC and iON Worldwide, Inc. As part of that merger agreement, the intellectual property of Contour was assigned to a holding company, Contour IP, one of the named Plaintiffs here. And each of Contour LLC and iON Worldwide took an ownership interest in Contour IP. Contour IP then issued to iON Worldwide an exclusive license to practice of the patents.

1 THE COURT: So the two entities
2 merged?

3 MR. SCHOENHARD: The two entities
4 attempted to merge. And this explains in part
5 the challenge in language here. They entered
6 into a functional merger. [REDACTED]

7 [REDACTED]
8 [REDACTED] and ultimately
9 that merger has resulted in a dissolution of
10 that merger that is in process in the background
11 today. I represent both Contour IP holding and
12 iON Worldwide. As the Court would surely
13 appreciate, I'm ethically borrowed from advising
14 either in terms of how that dissolution is to
15 take place or personally getting involved in
16 their dissolution proceedings. My understanding
17 is, and I can assure the Court that as of the
18 time the complaint here was filed, iON was an
19 exclusive licensee to the two patents in suit.
20 Contour IP Holding was the owner of the two
21 patents in suit.

22 Thereafter, the attempted merger
23 started to fall apart and the companies, at the
24 higher level, Contour LLC and iON have been

1 working to unwind that merger in the background.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED] It's my understanding as of
9 today that the parties expect to have reached a
10 sufficient agreement regarding their dispute
11 over licensing going forward that I should be
12 able to provide the Court with a status update
13 within the next week on that issue.

14 THE COURT: I guess, for purposes
15 of where we stand, it is the case or is it not
16 the case that as of this moment Contour LLC and
17 iON have merged. Whether they are attempting to
18 unwind that merger or whatever, -- isn't it the
19 case that the two entities did merge, are
20 currently iON, but are now attempting to unwind
21 that merger or is the status something else?

22 MR. SCHOENHARD: That's not quite
23 correct, Your Honor. At least to the best of my
24 understanding. And I have acknowledge up front,

1 I am not a corporate or corporate restructure
2 lawyer by training. My understanding is that
3 the attempted merger failed relatively near to
4 its inception in the process of bringing things
5 together, such that day, as I understand it,
6 Contour LLC is a separate operating company from
7 iON Worldwide. What their respective rights are
8 with respect to each other based on past
9 contracts has been the subject of some dispute
10 between them. But the two companies are
11 operating as separate corporate entities, have
12 separate management, are in other venues
13 represented separately and are not moving
14 forward together. It is my understanding that
15 at no point did the merger get to the point that
16 the two had fully merged into a single entity.
17 In fact, Contour LLC was always intended to own,
18 as a corporate body, a separate interest in
19 Contour IP. iON Worldwide was intended to
20 function as a manufacturing and sales arm of
21 what would become the Contour brand.

22 THE COURT: In terms of the record
23 before me on this, did you allege in the
24 operative complaint that they merged?

1 MR. SCHOENHARD: Yes, in the
2 operative complaint I alleged that the two had
3 merged in the late summer of 2015. That was and
4 is to this date my understanding of what the
5 appropriate terminology would have been for the
6 agreement they entered into and the process they
7 were undertaking. Since the time of the
8 operative complaint, the unwinding has taken
9 place.

10 THE COURT: Has any of that stuff,
11 whatever happened after this merger, is any of
12 that stuff in the record? You're saying it
13 right now in this hearing. Is there anything in
14 the record that tells me what's occurred as
15 alleged in the operative complaint that the two
16 entities merged?

17 MR. SCHOENHARD: Your Honor, no.

23 MR. SCHOENHARD: Unfortunately,
24 Your Honor, I'm not in a position to make a

1 formal assertion on that issue. It is my
2 understanding that there has been a dispute
3 between Contour IP and iON Worldwide as to
4 whether that exclusive license has been
5 effectively terminated and that it has been iON
6 Worldwide's position that the exclusive license
7 remains in effect. It has been Contour IP's
8 position that the exclusive license has been
9 properly terminated.

10 THE COURT: Maybe the better way
11 to ask it is in terms of what the record shows
12 in this case, the record that I can rely on,
13 what is the state of the record as to whether or
14 not iON is an exclusive licensee of the patents
15 in suit and whether at any stage between when
16 the case was initiated and now, iON failed to be
17 or was no longer an exclusive licensee?

18 MR. SCHOENHARD: I appreciate Your
19 Honor's interest in seeking clarity on this.
20 And as far as the standing record is concerned
21 in this case, iON Worldwide is, on this record,
22 the exclusive licensee until such time as the
23 dispute is resolved between them and the parties
24 can inform the Court that either that license

1 has now been terminated or that iON continues
2 forward as an exclusive licensee in the future.

3 THE COURT: And so on the current
4 record you're saying there's no indication that
5 at some point from the filing of the complaint
6 until now iON lost its status as an exclusive
7 licensee?

8 MR. SCHOENHARD: As my co-counsel
9 has flagged for me, and I appreciate that and
10 recognize it, the paper filed by Contour IP in
11 opposition to the motions filed by GoPro in this
12 case noted Contour IP's termination of that
13 exclusive license, so Contour IP's position on
14 that.

15 THE COURT: Okay. So Contour IP
16 has stated in a filing that it terminated iON as
17 an exclusive licensee?

18 MR. SCHOENHARD: Yes, Your Honor.

19 THE COURT: They may dispute that
20 or may not. Sounds like they would dispute
21 that, but that's in the record as well.

22 MR. SCHOENHARD: Yes, Your Honor.

23 THE COURT: Okay. Would you
24 acknowledge what's going on here is unorthodox,

1 unusual?

2 MR. SCHOENHARD: Certainly, Your
3 Honor. And I can acknowledge its put me through
4 no shortage of consternation personally. Your
5 Honor, as you recognized during Ms.
6 Khachatourian's opening argument, the timing of
7 the dissolution here is particularly unfortunate
8 when it comes to the motions that are currently
9 before the Court, in that on the same day that
10 Contour IP filed its oppositions to GoPro's
11 motions, Contour IP also filed an amended
12 complaint which was subsequently withdrawn that
13 would have effectively removed iON Worldwide
14 from the case.

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 For purposes of today's
23 proceeding, I've been advised by both clients
24 that they are comfortable with me proceeding on

1 behalf of both Contour IP and iON Worldwide,
2 that the two share the same interest in ultimate
3 resolution of these motions and the same
4 interest in moving this case forward as
5 expeditiously as practicable.

6 THE COURT: Okay. Well, why don't
7 we, you know, take some bit of time, why don't I
8 let you get to the points you want to make about
9 both motions and I'll try to add in any
10 questions I have along the way.

11 MR. SCHOENHARD: Thank you, Your
12 Honor. If I take the motions in the same order
13 in which Ms. Khachatourian did, I would begin
14 with the motion to stay pending IPR proceedings.
15 Here I would like to initially make three high
16 level points which we can unpack and of course I
17 will entertain Your Honor's questions as we go
18 and we can see where the conversation heads.

19 The first and most important point
20 for the Court here is the relevant stages of
21 this litigation and of the PTAB proceedings.
22 This topic consumed a significant portion of
23 Your Honor's discussion with Ms. Khachatourian.
24 I think it's something that we can address

1 briefly here. It is somewhat odd in going
2 through this Court's cases on whether to stay
3 pending IPR proceedings to find a situation in
4 which the PTAB is near conclusion of its
5 proceedings and litigation proceedings are in
6 the early stages. As Ms. Khachatourian noted
7 during her argument, really nothing has happened
8 up until now, either in this Court or in the
9 prior Utah action, which we'll address
10 separately shortly. Here I think for Your
11 Honor's benefit, the most important date in the
12 proposed scheduling order is the claim
13 construction hearing which had been proposed by
14 the Plaintiffs to take place in February of
15 2017. By that time the PTAB will have concluded
16 its review of the two patents that are at issue
17 in this case. That review would have concluded
18 approximately three to four months earlier,
19 depending on the precise timing of the claim
20 construction hearing. And in fact, the parties
21 would not have even begun briefing claim
22 construction in this case. All activities
23 between now and that time are activities that
24 Contour and iON would expect would take place

1 regardless of the outcome of any PTAB
2 proceedings. In particular, discovery regarding
3 the accused products and their functionality
4 would take place regardless. In the meantime,
5 discovery regarding the validity of the patents
6 would take place regardless.

7 The second point, which is highly
8 related, is that there are, in fact, eight
9 claims not at issue in the PTAB. I believe,
10 Your Honor, Ms. Khachatourian mistakenly
11 referred to the number as seven. It is, in
12 fact, eight. It's claims 3 through 10 of the
13 '954 Patent, so eight claims that are not at
14 issue in the PTAB. And here --

15 THE COURT: As to those claims,
16 you are asserting hopefully?

17 MR. SCHOENHARD: We certainly
18 intend to, Your Honor.

19 THE COURT: Regardless of whether
20 or not the PTAB invalidates every other claim as
21 to that patent, you're asserting it is the
22 Plaintiff's current intent to move forward in
23 the case as to those eight claims?

24 MR. SCHOENHARD: It is the

1 Plaintiff's current intent, yes, Your Honor.

2 THE COURT: In terms of what would
3 happen between now and October that might be,
4 were, for example, the other 22, 23 claims to be
5 invalidated, what might occur that would be
6 wasted in that scenario? There would be some
7 work, wouldn't there, responses to infringement
8 contentions as to the other claims, invalidity
9 contentions as to those claims -- the other
10 claims specifically, wouldn't that be work that
11 would be not utilized were the PTAB's decision
12 to come out a certain way, or other, other
13 examples?

14 MR. SCHOENHARD: To a great
15 degree, I don't expect so. As an initial matter
16 both Your Honor and Ms. Khachatourian have
17 referred to non-infringement contentions. It is
18 my understanding that non-infringement
19 contentions are not regularly a part of Delaware
20 patent practice. Infringement contentions
21 surely would be. That's of course a burden to
22 be borne by the Plaintiffs and a burden that the
23 Plaintiff's are prepared to bear. On the issue
24 of invalidity, yes, there would be invalidity

1 contentions that would be needed as to the
2 additional claims.

3 THE COURT: So you're not going to
4 file interrogatories seeking their contention as
5 to why they don't infringe?

6 MR. SCHOENHARD: To the extent we
7 would serve such interrogatories, Your Honor, we
8 might expect, for example, that work in
9 responding to those need not necessarily be
10 performed or fully perfected prior to the PTAB's
11 decision. There's nothing in the Court's rules
12 or the proposed schedule, as I understand it,
13 Your Honor, that would force a decision in that
14 interim period.

15 THE COURT: You're saying you
16 wouldn't press it? If they said look, we don't
17 want to respond to this until after October, you
18 wouldn't push it?

19 MR. SCHOENHARD: I think that
20 would be reasonable, Your Honor. On the issue
21 of validity one would expect that GoPro already
22 has in mind any invalidity contentions it has.
23 One thing that unless I missed it, Your Honor,
24 was not made clear during the earlier argument

1 this afternoon is that GoPro did, in fact, seek
2 IPR review of the eight claims that are not
3 currently before the PTAB and the PTAB declined
4 to institute review on those claims. That's
5 important for a couple reasons. First, GoPro
6 has already gone through the effort to develop
7 an invalidity case as to those eight claims. It
8 is not as if they would be starting from whole
9 cloth now. Second, it also renders, I believe,
10 questionable, Your Honor, just how much impact
11 the PTAB's decision as to the other claims would
12 necessarily have on those remaining eight
13 claims. After all, the PTAB has already decided
14 that I'm effectively the same record with the
15 same art before it to institute as to many
16 claims, not to institute as to those eight
17 facing the same arguments across the board. It
18 is thus not clear to me, Your Honor, that a
19 decision with respect to the others would
20 necessarily apply to the eight claims, which, as
21 Ms. Khachatourian acknowledges, are largely
22 means plus function oriented, which adds an
23 additional layer of proofs into a validity or
24 infringement analysis, such that proofs not tied

1 to means plus function claims would not
2 necessarily reach their means plus function
3 counterparts.

4 THE COURT: Are you asserting that
5 nothing the PTAB stays as to the remainder of
6 the claims that are under review would have any
7 bearing on the question as to whether or not
8 those means plus function claims are invalid?

9 MR. SCHOENHARD: No, Your Honor, I
10 would not go so far as to say it would have no
11 bearing. Surely the PTAB's sound judgment with
12 respect to other terms within those claims or
13 how the art might generally read could be
14 instructive to this Court. But it would not
15 necessarily be binding on this Court with
16 respect to those claims. And also there would
17 be the additional elements of the structural
18 mappings that would not be conducted by the PTAB
19 as part of its analysis.

20 THE COURT: I'll let you press on.

21 MR. SCHOENHARD: Related to Your
22 Honor's last question, of course, I think it's
23 worthy of noting that only two claim terms are
24 subject currently to apparent claim construction

1 before the PTAB. The eight claims that are not
2 before the PTAB include seven unique means plus
3 function claim terms. So if we're looking
4 forward to how this Court would likely proceed
5 in claim construction, if we are looking forward
6 to how the parties would argue with respect to
7 the currently instituted claims of the PTAB and
8 the non-instituted claims, we see little claim
9 construction oriented overlap, just two terms
10 currently before the PTAB.

11 Unless Your Honor has anything
12 further on the motion to stay, perhaps we turn
13 to the Rule 41(d) motion and devote some time
14 there.

15 THE COURT: Okay. Couple quick
16 questions.

17 MR. SCHOENHARD: Yes, Your Honor.

18 THE COURT: Can I consider the
19 relationship of a non-party, Contour LLC, when
20 it's trying to determine what prejudice the
21 Plaintiff, Plaintiffs in this action would face?
22 As opposed to treat them separately. You
23 recognize the contradiction. You're asking them
24 to treat them separately as to one set of

1 motions and then take into account the prejudice
2 LLC would face as to the others. Why isn't that
3 a contradiction?

4 MR. SCHOENHARD: I certainly do
5 recognize that, Your Honor. And I believe that
6 there is a narrow space between the two,
7 although I will recognize that it is a narrow
8 space. And that is really the function of
9 parent subsidiary going up versus going down.
10 Here Contour LLC owns a 51 percent share of
11 Contour IP. As a result, what impacts Contour
12 IP does impact Contour LLC. And GoPro's
13 position in the marketplace, which is a direct
14 competitor to Contour LLC, is thus relevant to
15 how the holding or how the holding in a
16 company -- I like to be careful in my usage of
17 terms, Your Honor. My apologies. How the
18 company with a controlling interest in the
19 patent holding company is ultimately impacted.
20 I would expect that for purposes of Your Honor's
21 weighing of the various factors that the
22 prejudice experienced by Contour LLC would
23 receive relatively little weight as compared to
24 the prejudice that could be experienced by

1 Contour IP as a patent owner directly.

2 THE COURT: Okay. And why don't
3 you seek a preliminary injunction here?

4 MR. SCHOENHARD: As Your Honor is
5 aware and as we will explore when we get into
6 the Rule 41(d) motion, there have been
7 proceedings ongoing between a Contour entity in
8 the previous case, Contour LLC, and GoPro for an
9 extended period of time. It did not seem
10 reasonable, frankly, to me, Your Honor, that at
11 the time that this case was filed by iON
12 Worldwide and Contour IP that a preliminary
13 injunction immediately be sought. I also know
14 that preliminary injunctions are rarely granted
15 and that this Court does have a very strong
16 track record of moving forward expeditiously
17 with patent proceedings according to its patent
18 rules.

19 THE COURT: Lastly, in terms of
20 the prejudice argument, you know, part of the
21 idea is look, we're going to be prejudiced if
22 we don't move forward in the stay pending IPR's
23 grant. You know, the Defendant is saying look,
24 these entities or at least entities relating to

1 them are out in Utah. They were holding the
2 patents at the time. They agree to a stay for
3 many months before this motion dismiss is
4 rectified. And they take action by dismissing
5 that case and filing here, which is almost
6 certainly going to add further delay to the
7 moving forward of the case. Its ended up
8 adding -- whatever would have happened in Utah,
9 its ended up adding some number of months now to
10 the moving forward of the case as to these
11 patents. If the idea is we need to move
12 forward, we're so prejudiced if we're not moving
13 forward, why doesn't the lack of moving forward
14 of your own volition as to the patents, again,
15 albeit as to a different entity in Utah, now
16 tell me that there's no problem with granting a
17 motion to stay here with respect to the case?

18 MR. SCHOENHARD: Your Honor, I
19 think it's very important and perhaps I should
20 have made this crystal clear at the outset. I
21 think it's very important that we recognize the
22 difference between the agreed motion to stay in
23 Utah and the motion to stay that is now pending
24 before this Court. At various points, Your

1 Honor, I heard Ms. Khachatourian suggest that
2 the motion to stay pending IPR review that was
3 filed later in the Utah proceeding --

4 THE COURT: You agreed to the stay
5 pending the resolution of the motion to dismiss.
6 There was no agreement as to the motion to stay
7 that you learned they were going to file as to
8 the IPR?

9 MR. SCHOENHARD: Correct, Your
10 Honor. As to that motion, the motion to stay
11 pending the IPR, it was Contour's position that
12 that motion was never properly filed and that a
13 stay was already in place in the case. Nor did
14 Contour LLC at that time have any interest in a
15 further stay of proceedings. As to the stay
16 pending the motion to dismiss, that was a stay
17 of a limited duration pending the Court's
18 hearing that was to take place in January of
19 this year. Refiling or after the merger when
20 ION chose, along with Contour IP, to file in
21 this Court, that would not necessarily delay the
22 case further. Neither the Utah action nor this
23 action has ever seen an answer from GoPro,
24 which, Your Honor, is something that continues

1 to astound me as my understanding of the rules
2 is that at the allotted time either a Rule 12
3 motion or an answer ought to be filed. We have
4 not seen one yet. At the time that iON chose to
5 bring this case in Delaware rather than
6 attempting to intervene and recaption the then
7 stayed Utah action, iON and Contour IP did not
8 see any further delay that would be brought
9 about by proceeding here in this forum that was
10 readily convenient to iON, and again, has a long
11 history of proceeding forward in patent cases.

12 THE COURT: But I guess -- well, I
13 want to leave you time to argue the Rule 41
14 motion. Put differently, the patent holder
15 filed the Utah action when, sometime in 2014?

16 MR. SCHOENHARD: It was November
17 2014.

18 THE COURT: And didn't fight, of
19 its own volition, agreed to a world in which the
20 case wasn't going to move forward until at
21 least, and again, they transferred the patents.
22 But you know, at least now basically or to the
23 extent they didn't agree to that, the entities
24 who currently have rights in the patent, whoever

1 they are, they agreed to it, so the idea is the
2 holders of the patents have, of their own
3 volition, agreed to not move forward from
4 November 2014 until now. Now they say, wait a
5 second. We've go to move forward, so why is
6 there a contradiction there?

7 MR. SCHOENHARD: Your Honor, I
8 believe that in the process of your explanation
9 you may have actually identified our answer.
10 And that is the change of the corporate parties
11 that are involved here. Contour LLC was the
12 named Plaintiff in Utah, was the party
13 proceeding in Utah and was comfortable with the
14 several month delay that would have taken place
15 pending that motion to dismiss in Utah. When
16 Contour LLC found iON Worldwide as a business
17 partner and target for a merger, iON Worldwide
18 had a separate corporate interest and to this
19 day continues to have a separate corporate
20 interest. In fact, perhaps their separate
21 corporate interests suggests the reason why that
22 attempted marriage ultimately resulted in a very
23 quick annulment or divorce. iON Worldwide has
24 been, from the time it has taken an exclusive

1 license to the patents, through the figure of
2 the complaint here in Delaware, has been very
3 interested in proceeding rapidly on the patent
4 rights it then held as an exclusive licensee.
5 Contour IP Holding, the patent owner by
6 assignment, is a non-operating holding company
7 that had granted that exclusive license to iON
8 and as part of that exclusive license a shared
9 right for assertion. iON Worldwide, again, with
10 an effort to move forward expeditiously in a
11 forum of its choosing that was convenient to it
12 as a Delaware entity and I believe its principle
13 place of business is also local here. I believe
14 it's in the Philadelphia area. I hope I'm not
15 mistaken on that, Your Honor, that iON would
16 move forward. iON Worldwide, Contour LLC is,
17 different corporate entities, different
18 interests in terms of how quickly this case
19 ought to proceed.

20 THE COURT: Are there different
21 decision makers at iON as opposed to the
22 decision makers at Contour LLC?

23 MR. SCHOENHARD: At various points
24 in time, Your Honor, it's not always clear to

1 me. I believe at a point during the merger, I
2 believe they had started to share some level of
3 management, which then rapidly unwound again.
4 But my understanding is that the top level
5 management of iON remained disparate from the
6 top level management of Contour.

7 THE COURT: I guess what I'm
8 asking is, Contour LLC decided that it was going
9 to file a case in Utah. Then there was this
10 merger or maybe not merger, whatever it was, and
11 now there's iON. And separately there's this
12 new holding company, Contour IP. If it turned
13 out to be the case that the same people,
14 regardless of the change in corporate form, who
15 had decided to file the case in Utah were the
16 same ones making the decision to now dismiss it
17 and file it here, that might be one thing as
18 compared to if it's different people, a new
19 entity that comes in, has different views and
20 wants to do something different, maybe that's
21 something else. Is there anything in the record
22 that helps me figure out whether these are the
23 same decision makers or different decision
24 makers as compared to Contour LLC versus iON

versus Contour IP?

MR. SCHOENHARD: I don't believe so, Your Honor. And it's my general understanding that the top level decision makers were different, but without muddying the record here with speculation and without piercing attorney/client privilege, I couldn't dig too deeply.

THE COURT: Fair enough. Let's move to the Rule 41 motion. My first question is, and you can supplement, is the other side has said, look, we believe forum shopping is in play and we think the reason why they dismissed that case and filed this case is because they thought they were going to lose the motion to stay pending IPR out there and they wanted to move forward. They were worried about it and had reason to be worried about a decision on that motion and they decided to file in a more friendly forum as to that legal issue. Tell me why the record doesn't support that conclusion?

MR. SCHOENHARD: Yes, Your Honor.

And I think that ties to two issues. The first, at the very obvious initial level, is the motion

1 to stay pending IPR in Utah and the second is
2 what opposing counsel has referred to as a
3 corporate shell game, which I think is then tied
4 into this discussion. The first, the motion to
5 stay pending the IPR in Utah was a motion that
6 Contour never believed was appropriately filed.
7 That case had already been stayed. There were
8 no ongoing proceedings in that case as the
9 parties awaited a hearing on a motion to dismiss
10 in January, that was to happen in January of
11 this year.

12 THE COURT: Was it going to be
13 argued at that January hearing?

14 MR. SCHOENHARD: Not to my
15 knowledge. As far as I'm aware, and with my
16 apologies to the Court, if there's something in
17 that docket of which I'm not aware, it's my
18 understanding that that had not be calendared
19 for argument, that the briefing had not been
20 completed and that all that was currently of
21 record in that case was GoPro's motion to stay.
22 There would be no indication to Contour at that
23 point, as far as I know, when that was going to
24 be heard or how that could possibly impact that

1 case.

2 THE COURT: Is it the case that
3 Contour IP was formed in Delaware on the same
4 day that the motion to stay in favor of IPR was
5 filed in the District of Utah?

6 MR. SCHOENHARD: No, Your Honor.
7 Contour IP was actually formed in the mid summer
8 of 2015. And I believe Ms. Khachatourian
9 actually referenced, Your Honor, to when Contour
10 IP was formed. The assignments of the patents
11 took place into November of 2015, as iON and
12 Contour were moving forward with their merger.
13 And it was at that time that the assignments
14 were recorded and almost immediately upon
15 recordation of the assignments, which would then
16 perfect the exclusive license grant to iON
17 Worldwide, iON Worldwide and Contour IP, as of
18 that time then being the patent owner and
19 exclusive licensee, moved forward with the
20 instant case. I can assure Your Honor that that
21 timing was not tied to the filing of a motion to
22 stay against Contour LLC.

23 THE COURT: Maybe I misspoke, but
24 I had understood Ms. Khachatourian to be

1 asserting that on the same day the motion to
2 stay in favor of IPR was filed in Utah, a
3 relevant formation event with regard to Contour
4 IP occurred, whether it was the formation in
5 Delaware or their assignment of the patents. As
6 far as you understand, did anything occur?

7 Maybe I either misremember or am mistaking what
8 Defendants stated, but did anything occur on the
9 same day the motion to stay was filed in Utah?

10 MR. SCHOENHARD: Your Honor, I
11 regret to say I don't know if it was precisely
12 the same day, but I believe the assignments of
13 the patents to Contour IP were recorded on
14 approximately the same day or within several
15 days of when the motion to stay pending IPR was
16 filed in Utah.

17 THE COURT: Those two things were
18 unrelated?

19 MR. SCHOENHARD: Yes, Your Honor.

20 THE COURT: Unrelated?

21 MR. SCHOENHARD: Yes, Your Honor.

22 THE COURT: All right. Let me
23 just ask a couple more questions and then to the
24 extent I don't cover the issues that you wanted

1 to touch on in my questions, I'll let you use
2 your remaining time to address any more issues.

3 MR. SCHOENHARD: Thank you, Your
4 Honor.

5 THE COURT: On the issue of the
6 identity of the parties with respect to a Rule
7 41 motion, if I'm trying to figure out whether
8 or not when Rule 41 refers to a Plaintiff, one
9 that must be, in all cases, the exact same
10 entity that was in one case is in another or
11 whether there is some flexibility there, I asked
12 the other side what its best argument was on
13 that question. What's your best argument as to
14 why they're wrong and the fact that we have
15 different entities as Plaintiffs in the cases
16 makes a difference?

17 MR. SCHOENHARD: Your Honor, I
18 believe the language of the rule here is clear.
19 The language of the rule says a plaintiff,
20 suggesting, in fact, the same plaintiff. Now,
21 there are circumstances in which a corporation
22 goes through a change in corporate form or a
23 corporate name change. That is something that
24 is certainly not unfamiliar to this Court. That

1 is substantively different when there is, in
2 fact, a transfer of assets between parties.
3 Here Contour IP Holding was formed as a separate
4 entity with ownership interests by Contour LLC
5 and iON Worldwide, a completely separate
6 corporate entity, to then collectively own a set
7 of IP that had previously been owned solely by
8 Contour LLC. Contour LLC retained a slightly
9 controlling interest in that holding company, a
10 51 percent versus 49 percent share, but that is,
11 in fact, a transfer of assets into a separate
12 corporate form with separate -- and again, not a
13 wholly owned subsidiary where you could even say
14 that there is complete and total control over
15 all assets including their disposition, rather a
16 jointly owned entity as between Contour LLC and
17 iON.

18 THE COURT: And maybe this is
19 related, but this goes without saying, but it
20 wouldn't, whether it were able to do it or not,
21 it would be a great thing if the rule were
22 basically meant to stop one party from filing a
23 case in one district and then turn around and
24 filing in another without having to incur some

1 costs, but someone got around that by somewhat
2 cleverly, you know, creating an entity solely
3 for the purposes of avoiding that rule, then
4 feel good if that's the case. And if I'm asking
5 you what's the, what's the basis to believe why
6 this wasn't just simply, a, as the defense says,
7 a shell game to avoid, among other things, the
8 implication of that rule? You're saying well,
9 look, this is a jointly owned entity that arose
10 out of an attempted merger with another company.
11 Is the idea behind that that look, it's got to
12 be clear that there are other reasons why this
13 entity was formed other than avoiding this rule
14 or some harm in the litigation?

15 MR. SCHOENHARD: Yes, Your Honor.
16 And I believe that's the reason why many of the
17 cases addressed Rule 41(d) use the term
18 vexatious. There is, as Ms. Khachatourian
19 pointed out, a policy interest in avoiding
20 duplicative litigation and the type of situation
21 Your Honor has suggested where a party is really
22 trying to sue a company, things aren't looking
23 that great, go find a new forum. Here what we
24 have is something that, Your Honor, in my view

1 is very, very different. Contour has gone
2 through several forms over a period of years,
3 each time largely because it has had difficulty
4 competing against GoPro in the marketplace. And
5 like a Phoenix rising up from the ashes, every
6 time it attempts to do so either find a new
7 owner or a new partner, GoPro manages to knock
8 it back down. As part of its attempted
9 resurrection, if you will, in Utah, Contour
10 again tried to go up against GoPro in the
11 marketplace and also in the IP arena. When it
12 was running lower on resources it was looking
13 again for another partner. It found iON
14 Worldwide. It did not create or concoct some
15 new entity. It did not look for a way to get
16 out of Utah and find a convenient entity that
17 would allow that, rather it looked for an active
18 participant in the industry, a participant that
19 could ideally leverage what it had and they
20 could find some level of synergy between their
21 product offerings and then compete effectively
22 in the marketplace. There's no suggestion, I
23 don't believe, Your Honor, anywhere in the
24 record that iON Worldwide was not previously an

1 operating entity or was not a legitimate target
2 for a merger with Contour. I don't believe such
3 an argument could be made. Although ultimately
4 that merger was unsuccessful, I think it's clear
5 on this record, Your Honor, that iON and Contour
6 had attempted to form something that ultimately
7 could succeed in the marketplace that as part of
8 that effort, iON ultimately became an exclusive
9 licensee and attempted to control its own
10 litigation of the IP assets that had at one
11 point been held solely by Contour.

12 THE COURT: Relatedly, you say
13 that the reason why the case was filed here was
14 that Delaware was more convenient for iON.
15 Perhaps you're saying it as to Contour IP too,
16 but at least for iON. In terms of the people
17 that are the decision makers, what was it about
18 Delaware for those who were making decisions as
19 to the new Plaintiffs that actually made it more
20 convenient?

21 MR. SCHOENHARD: So for iON
22 Worldwide, iON is a Delaware corporation that in
23 its view is actually an important thing. People
24 take advantage of Delaware as a forum for

1 particular reasons. Be it on the tax and
2 bankruptcy side or be it on the IP side, there's
3 quite a bit of respect for these courts when it
4 comes to IP cases.

5 THE COURT: If it were the case
6 that in essence the same people who were driving
7 the entity that filed in Utah then turned around
8 and dismissed it and filed here, that wouldn't
9 make sense, right? You'd have the same decision
10 makers who already filed this case in another
11 jurisdiction and the ability to decide where to
12 file it, would then be making a different
13 decision, but your assertion is that was them,
14 this is iON, iON was a different group of
15 people?

16 MR. SCHOENHARD: Correct, Your
17 Honor. iON -- that's where I was headed next.
18 It's a Delaware corporation with a principle
19 place of business here on the east coast. And
20 I'll probably turn to my co-counsel and make
21 sure it's a nod. I believe I may have misspoken
22 earlier when I suggested it was a Philadelphia
23 place of business. It may actually be New
24 Jersey, I believe. But it is also physically

1 located here on the east companies.

2 THE COURT: All I'm saying, if the
3 two entities merged but it turned out that
4 Contour LLC, their decision makers, the heads of
5 that company, became -- were iON and those
6 people had already made the decision to file in
7 Utah, it wouldn't make a lot of sense to say
8 that iON decided that it was more convenient for
9 it to file in Delaware if the entity, albeit a
10 different entity, the decision makers were the
11 same, right? Now, if there's some kind of
12 merger and new persons who weren't involved and
13 already filing the case in Utah come into play,
14 maybe they have different views and et cetera.
15 You're telling me it's the latter situation
16 that's occurring here?

17 MR. SCHOENHARD: Yes, Your Honor.
18 And I certainly appreciate your concern, but iON
19 Worldwide is an east coast entity, not a Utah
20 based entity. And iON Worldwide sought east
21 coast based counsel to proceed with this case.
22 They were interested in moving forward in
23 litigation on their home turf against a company
24 that they understood to be incorporated in the

1 same state they were and pursue forward with
2 their claims.

3 THE COURT: Okay. You have a few
4 minutes left. Let me just make sure there's not
5 a question that I really want to ask that I
6 didn't ask and give you a chance to add anything
7 you need to add, Mr. Schoenhard. Is there
8 anything you want to say about the argument that
9 because iON didn't file a response to the
10 motion, motions, that as to them the motion
11 should be granted?

12 MR. SCHOENHARD: Yes, Your Honor.
13 Thank you. I had intended to go there at the
14 outset with my initial discussion of the
15 corporate doings that are involved in this case.
16 As Your Honor recognized during the earlier
17 argument, at the time the oppositions were
18 filed, the amended complaint was also on file
19 and had not been withdrawn yet at that time.
20 iON'S position today is that it stands in
21 effectively the same shoes as Contour IP is,
22 putting forward these same defenses as to these
23 motions, but also notes that iON Worldwide was
24 at no time involved in the Utah action nor is

1 ION Worldwide a party to the PTAB proceedings.
2 And thus it was appropriate that Contour IP, as
3 the patent owner and as per GoPro's allegations,
4 the company more closely tied to Contour LLC to
5 continue to lead the charge as to these two
6 motions.

7 THE COURT: Is there anything you
8 want to say, Mr. Schoenhard, that I haven't
9 asked you about with regard to Rule 41? You're
10 right about at your time. I'll give you a final
11 word or two.

12 MR. SCHOENHARD: Yes, Your Honor,
13 if I could state two things just very briefly.
14 First, Ms. Khachatourian repeatedly stated that
15 nothing had happened in Utah. In fact, I
16 believe at one point I wrote down the quotes,
17 clearly nothing happened in Utah. When it comes
18 to a motion, a rule like Rule 41(d) where the
19 primary focus of the rule is on preventing
20 duplicative litigation, the fact that nothing
21 had happened in the prior suit is rather
22 important. This is not -- that's primary point
23 one.

24 Primary point two, but relatedly,

1 there is nothing in this record that would
2 suggest that iON and Contour's IP's interest in
3 pursuing this litigation is vexatious or is
4 directly tied to what Contour LLC was doing in
5 Utah other than clearly as part of the pass of
6 the patent rights there was a need to pursue the
7 litigation either by attempting to intervene and
8 go through procedural finagling in Utah or to
9 file separately. iON and Contour IP, as the new
10 parties in interest of the patents, chose to
11 proceed in Delaware. I believe they had good
12 cause to do so and that does not suggest any bad
13 intent on their part.

14 THE COURT: Okay. Thank you, Mr.
15 Schoenhard.

16 MR. SCHOENHARD: Thank you, Your
17 Honor.

18 THE COURT: I appreciate it. Ms.
19 Khachatourian, I'm going to give you five
20 minutes for rebuttal.

21 MS. KHACHATOURIAN: Thank you,
22 Your Honor. I'm from New York originally.
23 Since I have five minutes I'm going to incline
24 to talk fast, so slow me down if I go to too

1 fast.

2 Your Honor, first and foremost
3 there are documents that go to the very point of
4 who is in control of this litigation that
5 Contour produced after all these papers were
6 filed. It actually answered your question.
7 They are marked attorneys eyes only, so I don't
8 want to mess up the record to tell you what's in
9 those documents. I don't know, do I have
10 permission to discuss what are in those
11 corporate documents? They're attorneys eyes
12 only. But nonetheless, Your Honor should look
13 at these documents, because they outline who has
14 control of this litigation and it goes directly
15 to the idea of who is in control, are they the
16 same people, is it the same people as Contour
17 LLC. All of the information you're asking for
18 are in those documents.

19 THE COURT: Let me have you not
20 make reference to documents that would otherwise
21 be protected by either agreement or with regard
22 to confidentiality, but I understand what you're
23 saying is that there are documents not in the
24 record that you think would shed light on some

of the questions I'm asking?

MS. KHACHATOURIAN: They are directly on point, but because they are marked attorneys eyes only, I don't want to cause the transcript to be under seal and all that information, so I would request that Contour provide you with these documents. They are short to the exclusive license and the terms of that license and the information is directly on point and will provide clarity as to who is actually the Plaintiff here. And I won't go any further than that.

The second thing I wanted to add was Contour LLC was the party that stipulated to the stay in Utah. And it's the same party now who is claiming prejudice if this action is stayed pending reexam. So it wasn't -- it was Contour LLC, so I don't think their argument is fair that, you know, it was supposed to be a brief stay and it should have moved forward. It's contradictory. You can't claim prejudice on the one side to a stay and then say hey, I'll stay this case for eight months, it's not a big deal.

1 In terms of my statement nothing
2 had happened in Utah, what I meant by that was
3 substantively.

4 THE COURT: For purposes of the
5 second filing of the motion to stay?

6 MS. KHACHATOURIAN: With respect
7 to the motion to stay that was pending in Utah,
8 there had been a notice requesting that it be
9 heard on January 12th. It is true that the
10 Court hadn't ordered that the motion to stay be
11 heard on January 12th, but it had been
12 requested, so Contour was on notice.

13 Contour also mentioned that they
14 would not ask questions about the claims that
15 were pending before the PTAB on infringement.
16 Why is that, Your Honor? Because it doesn't
17 make sense to do so. Inherent in that is a
18 simplification of the issues. So in some sense
19 they at least are implicitly conceding that with
20 respect to the claims that are pending before
21 the PTAB, this case should be stayed and that
22 the case should be simplified because of those
23 pending claims.

24 And I will say that with respect

1 to these means plus function claims, and it's
2 really important that the Court see that the
3 claims that are at issue at the PTAB will have
4 tremendous effect on these means plus function
5 claims. It would be a waste of judicial
6 resources for the Court to be reviewing whether
7 the specific implementation of these means plus
8 function claims is unpatentable without first
9 considering the PTAB's decision as to whether
10 claims directed to the same features are found
11 to be unpatentable. In other words, these means
12 plus function claims have the same features as
13 all of the claims currently pending before the
14 Board. The only difference is it's a
15 corresponding structure and implementation. And
16 to give you an example, if you actually look at
17 these means plus function claims and compare
18 them to the claims before the PTAB, Claim 1, one
19 of the dependent claims state generated from the
20 video image data, first video image content at a
21 first resolution and second video image content
22 at second resolution wherein the first
23 resolution is lower than the second resolution.
24 Essentially you're creating two video streams.

1 There's a lower and higher res. In Claim 3, one
2 of the means plus function claims, a portable
3 point of view digital video camera comprising,
4 discusses some information and says means for
5 generating a first data stream and a second data
6 stream corresponding to the video image data
7 wherein the second data stream is a higher
8 quality than the first data stream. It's the
9 same thing. It's just tied to a structure, to a
10 device. And I could go through piece by piece,
11 but essentially that's what you'll find. If you
12 look at the claims, you will see an incredible
13 amount of overlap.

14 THE COURT: What's your response
15 to the other side's point that the PTAB had the
16 ability to institute review on these eight
17 claims and didn't and so it indicates some
18 greater substantive strength as to these claims
19 vis-a-vis invalidity and therefore some greater
20 likelihood that the case will in fact proceed
21 forward as to those claims, and even if we are
22 likely to learn important information from the
23 PTAB as to the related claims?

24 MS. KHACHATOURIAN: So the PTAB in

1 its analysis didn't say that, you know, it's not
2 likely that these will be invalidated. What the
3 PTAB said was just that we didn't show the
4 required specific structure in the prior art,
5 which is generally the case, because it's
6 printed publications, it's not devices. So they
7 are just --

8 THE COURT: But I guess my point
9 is, if we're trying to take bets on whether this
10 is a case where the Plaintiff is likely, in
11 fact, to proceed forward even if they get bad
12 news as to the related claims, why wouldn't, the
13 substance of what the PTAB is saying to us
14 suggest maybe this is a case where the Plaintiff
15 might actually go forward even though you're
16 telling me there's no way they can go forward?

17 MS. KHACHATOURIAN: Because the
18 PTAB only addressed this at a high level.
19 Because structure is difficult to see in prior
20 art and they didn't really go into a lot of
21 analysis. And given the relatedness of the
22 claims. In other words, after the PTAB's
23 decision, I think this will illustrate it,
24 assuming GoPro wins on all claims. The patent

1 owner's argument necessarily becomes, even
2 though the PTAB found all recited features as
3 unpatentable, my specific implementation using
4 specific hardware and software is still
5 patentable. And GoPro uses the same specific
6 hardware and software. So therefore they
7 infringe. In other words, means plus function
8 claims have the same features as all of the
9 claims currently before the PTAB as I
10 illustrated in one of my readings. The
11 difference is you have to point to hardware and
12 software. Well, if your features are invalid,
13 it doesn't matter what my hardware or software
14 does. So basically if the case isn't stayed,
15 we're getting past the PTAB. We're not letting
16 the PTAB do its job, because these claims are so
17 interrelated. And the fact that the PTAB didn't
18 institute on these claims really is of no
19 relevance, because there is a whole slew of
20 other prior art that we could bring into court
21 that we couldn't bring at the PTAB given their
22 limitations. And because means plus function
23 claims are hardware software embodiments, you're
24 more prone to go to the type of art that you

1 can't bring before the PTAB. It's only written
2 publications.

3 THE COURT: Okay. We're going to
4 have to leave it there.

5 MS. KHACHATOURIAN: One other
6 super quick thing is given all the mess on who
7 owns what and am I exclusive licensee, am I not,
8 I think it's really important that the Court --
9 it's not GoPro's burden, their dispute. I mean
10 there is a shadow of doubt over who owns the
11 patents and all the rest of it, so I think
12 there's a preliminary question that needs to be
13 decided whether iON owns these patents and who
14 is the really the party in suit and why should
15 this case move forward? So if the Court is not
16 inclined to grant a motion to stay pending IPR,
17 I would submit that the Court stay the case in
18 its inherent discretion while the standing
19 issues get worked out.

20 THE COURT: Okay. Thank you.

21 MS. KHACHATOURIAN: Thank you,
22 Your Honor.

23 THE COURT: Let me take a short
24 break and come back probably in about five

minutes or so to pick up the remainder of what we're going to do here, which will be to talk about case management and other related issues.

So court will stand for a short recess. Thank you.

(Short recess.)

THE COURT: So it ended up being a little more than five minutes, but I was able to handle that criminal matter, so we won't have to deal with that before we're done here. Okay.

So what's remaining is the case management conference portion of what's on our schedule for today. And let me just tell you, say a couple of things for the record about my role in the case and then talk about scheduling related issues. I know there are a number of disputes, including whether to set a schedule at this stage. So but first let me first say, as I think the parties know, with regard to my role in this case as it relates to the referral from the chief judge, I would have certain purview in the case which would include the following: I've been referred the case for scheduling purposes, which among other things means to prepare for

1 and handle the case management conference, which
2 is what we're doing now, to decide one, whether
3 to enter a schedule. It also means to decide
4 any scheduling related issues that come up after
5 a schedule is entered, for example, if there are
6 protective order related disputes or other
7 initial scheduling related disputes, those would
8 be referred to me by Chief Judge Stark and I
9 would decide them in the first instance. That
10 said, what the parties could expect as the case
11 moves forward, if and when it does, is that at
12 some point you'll see from Chief Judge Stark's
13 chambers an order that in effect would take back
14 authority for dealing with scheduling related
15 disputes. That order would probably come
16 somewhere around three months or so from the
17 date of the case management conference, again
18 assuming the schedule is entered and the matter
19 is proceeding forward. And the idea is that at
20 that point we're likely closer to the case
21 events which Chief Judge Stark himself is going
22 to be handling those matters like Markman and
23 what comes after it and so it only makes sense
24 that at that stage of the case he and his

1 chambers be the one to decide whether any
2 changes to the schedule should be made.

3 In addition to scheduling, I've
4 got referral authority to decide motions to
5 dismiss, transfer and stay. Obviously we have
6 two stay motions before me now, which I will
7 decide those motions in the first instance. And
8 then lastly, the matter would be referred for
9 alternative dispute resolution and I would be
10 the magistrate judge who would initially be
11 assigned to pursue discussions with regard to
12 ADR with the parties.

13 That said, in cases like this
14 where I also have authority from the chief judge
15 to handle other substantive motions, what we say
16 to the parties is to the extent that either one
17 side or the other or both would wish or prefer
18 that I not be the magistrate judge that
19 addresses ADR with the parties because I have
20 another role in the case to resolve substantive
21 motions, in that instance, if even one party
22 would not wish me to be the magistrate judge to
23 handle ADR, the parties would file a short joint
24 letter, the text of which is found on my portion

1 of the District Court's website, which in
2 essence just says that there has been a request
3 that a different magistrate judge be assigned
4 the case for ADR purposes. If I get that
5 letter, I forward it on to our chief magistrate
6 judge, Chief Judge Thynge, then in almost all
7 instances, she, in fact, does assign the matter
8 to a different magistrate judge to pursue ADR
9 while I remain with the remainder of the
10 referral from Chief Judge Stark.

11 Okay. So second, with respect to
12 process and procedure, what I would typically do
13 and what I will do here today is to talk about
14 the disputes that the parties have with regard
15 to the schedule itself. Now, I know that one
16 kind of threshold dispute is do I enter a
17 schedule at all at this stage? And I would tell
18 you on that front what I would normally do in a
19 case like this, even with these two motions
20 pending, is the decision -- really the only
21 decision I have to make is do I enter a schedule
22 now until I resolve these motions? What I would
23 normally do is I would normally be inclined to
24 enter a schedule in part because Chief Judge

1 Stark, as the parties know, in his patent
2 procedures has a preference for cases remaining
3 to move forward even with pending motions to
4 stay in place. And because with respect to both
5 these issues, there are the motion to stay
6 pending IPR and the motion for costs, there are
7 at least some substantive arguments on each side
8 that are worth exploring. And so in the main
9 what I would normally do is enter a schedule
10 with the expectation that these motions would
11 probably be decided at some point in the middle
12 of the initial disclosures period. And if the
13 motions were granted or one or the other were,
14 then the case would be stayed at that point. If
15 they weren't, the case would continue to move
16 forward.

17 That being said, there are enough
18 issues that I heard today about issues relating
19 to merger, to patent ownership, to all of the
20 moving pieces here, I want just a day or two to
21 consider whether it does, in fact, make sense to
22 enter a schedule or not with these motions to
23 stay pending. So what I'm going to do is I'm
24 going to go through with the parties the

1 disputes with regard to the schedule and resolve
2 those and I'm going to address what other
3 information should be included in a schedule.
4 And I'm going to ask the parties to jointly file
5 a revised proposed scheduling order by no later
6 than this Friday so that I have a schedule that
7 I can enter if I, in fact, decide in my
8 discretion to do so and that will give me the
9 time to be able to consider just a little bit
10 more whether it makes sense to do that in this
11 case.

12 Any questions about that in terms
13 of procedure going forward from the Plaintiff's
14 side?

15 MR. SCHOENHARD: No, Your Honor.

16 THE COURT: Okay. And the
17 defense?

18 MS. KHACHATOURIAN: No, Your
19 Honor.

20 THE COURT: All right. Secondly,
21 just in terms of before we get to the schedule
22 related disputes, which is the next thing I will
23 turn to, is as to the motions, particularly the
24 motion to stay pending -- with regard to the

1 Rule 41 issue, I know the issue as to attorneys
2 fees is before the Third Circuit. My
3 expectation is at some point in the coming
4 months we get a decision from them as to that
5 issue, are attorney fees getable as for purposes
6 of Rule 41(d). My sense is and the parties can
7 tell me if I'm wrong, even if I was inclined to
8 wait for some guidance from the Third Circuit on
9 that specific question, I could decide the
10 threshold issue with regard to the Rule 41
11 motion earlier; that is, whether there is even
12 entitlement to costs under Rule 41 and thus
13 whether the stay could even possibly be
14 warranted while still putting to the side for a
15 second whether if costs were getable, those
16 costs would include attorneys fees. Could I not
17 do that or does any side see a problem with me
18 being able to kind of at least decide that
19 threshold portion of the motion even if I was
20 inclined to wait for the Third Circuit as to the
21 other issue from the Defendant's side?

22 MS. KHACHATOURIAN: Your Honor, I
23 believe the answer would be yes, but there's one
24 element that I'm a little concerned about,

1 because we don't have a full record not even
2 today, which is who is the Plaintiff? So if
3 Your Honor believes that you have to go beyond
4 what's in the record to determine whether it's
5 the same plaintiff, I believe there are
6 documents and the corporate structure and who
7 owns what is still incredibly unsettled. The
8 record states that as of February 19th iON was
9 not an exclusive licensee and there are
10 documents that are produced to us that shed
11 light on that one issue, on who has control.
12 And so I would submit to Your Honor that in
13 order to fully review the one issue of the
14 Plaintiff, that Contour produce those documents
15 to you en camera.

16 THE COURT: Okay. Are these --
17 because that was a separate issue I wanted to
18 address, which is the documents you raised which
19 I think that the Defendant's side believes would
20 have bearing on some of the decisions I need to
21 make with regard with to the pending motions.
22 These are documents that have been produced to
23 the defense but are just subject to some prior
24 agreement with regard to confidentiality?

1 MS. KHACHATOURIAN: Yes, Your
2 Honor. They were produced to us and produced
3 under the local rule that they would be produced
4 to us AEO, attorneys eyes only. And I wanted to
5 be considerate of the Court and of counsel.
6 It's always annoying when people start blurting
7 out AEO stuff in open court.

8 THE COURT: I'm not sure why the
9 request to submit them en camera or frankly why
10 either side couldn't submit them if I felt that
11 they might be helpful.

12 MS. KHACHATOURIAN: Your Honor,
13 I'm more than happy to submit them to you under
14 seal.

15 THE COURT: Okay. All right.

16 MS. KHACHATOURIAN: That's not a
17 problem at all.

18 THE COURT: All right. Let me get
19 the Plaintiff's take on that on whether I could
20 decide at least the threshold questions on the
21 Rule 41 motion even if I was inclined to wait on
22 the Third Circuit issue?

23 MR. SCHOENHARD: As a general
24 matter, yes, Your Honor, I don't see any reason

1 why you could not. And in fact, I think for the
2 purpose of Rule 41(d), the relevant time point
3 is at the time of the filing of the complaint
4 that is now complained of as part of the Rule
5 41(d) motion. Here I don't actually believe
6 there is any legitimate dispute as to whether at
7 the time of the filing of the complaint here
8 Contour IP holding was, in fact, the patent
9 owner of the two patents in suit or that iON
10 Worldwide, Inc. was the exclusive licensee of
11 the patents in suit. I'm happy to provide Your
12 Honor with the license agreement, which I
13 believe is the primary document that opposing
14 counsel is referring to, if that would aid you
15 in your consideration.

16 THE COURT: Okay.

17 MR. SCHOENHARD: But I believe
18 that anything that has happened since then would
19 ultimately not be directly relevant to the Rule
20 41(d) issue, which is tied to whether the newly
21 filed complaint was properly brought or was in
22 some way duplicative.

23 THE COURT: Okay. What I'm going
24 to do is I'll issue a short oral order after our

1 hearing today that will call for either side in
2 essence to provide -- and I'm looking for
3 focused, you know, documents -- to provide any
4 information that they believe would be relevant
5 to kind of the limited question as to the status
6 of relevant entities as it relates to the
7 pending motions. And I'll frame that out in the
8 oral order so there will be a little more
9 guidance than I just gave off the cuff there and
10 ask you to do that in a couple of days so that
11 I'd have at least what either side believes may
12 be relevant additional documentation that I
13 might not need ultimately to be able to resolve
14 those motions.

15 MR. SCHOENHARD: Thank you, Your
16 Honor. I expect that on our side where some of
17 this confusion has laid we should be able to
18 provide both that as well as a status update
19 that should resolve the issues going forward in
20 just a few days time.

21 THE COURT: Okay. All right. So
22 I'll issue a short oral order with regard to
23 that issue and we can move on from there.

24 MR. SCHOENHARD: Thank you, Your

1 Honor.

2 THE COURT: Thank you. With
3 regard to the schedule, what I would next do is
4 to first is, again, the assumption here is that
5 this is a schedule that I would enter as of the
6 end of this week beginning of next. Now, I know
7 there's a dispute about relevant dates in the
8 schedule which make up most of the disputes and
9 the gist of that is should we have a schedule
10 entered now or should we have a schedule that
11 enters in essence after the IPR proceeding has
12 concluded at the PTAB. Because the idea here is
13 that we'd be entering a schedule now, the
14 Plaintiff's dates would be submitted as part of
15 this order, but I've also obtained from Chief
16 Judge Stark's chambers some additional dates as
17 to certain hearings that would have to occur
18 before him that roughly match with what the
19 Plaintiff's proposals were.

20 Let me give those to you so you
21 can include them in the submission before I then
22 ask you about other disputed issues with regard
23 to the schedule. So with regard to the Markman
24 hearing -- again, this is all if the Plaintiff's

1 proposal with regard to dates as to a schedule
2 entered now will ultimately be adopted. The
3 Markman hearing would occur on March 6th of 2017
4 at 9 a.m. That's March 6th of 2017 at 9 a.m. A
5 hearing on case dispositive and Daubert motions
6 would occur on December 5th of 2017 at 1 p.m.
7 That's December 5th of 2017 at 1 p.m. A
8 pretrial conference would be held on March 9th
9 of 2018 at 11:30 a.m. That's March 9th, 2018 at
10 11:30 a.m. Trial would begin on April 9th of
11 2018 at 9 a.m. That's April 9th, 2018 at 9 a.m.
12 All of these hearings in Chief Judge Stark's
13 courtroom. Okay. So those dates would be
14 included in the submission as well.

15 Now, aside from that, if I'm
16 right, but you could help me, reading the
17 proposed scheduling order it looks like there's
18 four other areas of dispute that don't relate to
19 relative timing of dates. Let me tell you what
20 I think they are and then if we go through those
21 and if there's anything I missed, you can tell
22 me if I'm missing something.

23 I think the first is on Page 4.
24 That's really the dispute about whether

1 Defendant would need to produce sales figures as
2 of the date of the second initial disclosures in
3 Subparagraph B there. I think that's the first
4 issue that's disputed. That is a part of Chief
5 Judge Stark's patent procedures that the
6 Defendant does make that submission at that
7 time. Is there anything the Defendant wants to
8 say as to why they think that's not appropriate
9 in this case?

10 MS. KHACHATOURIAN: Your Honor,
11 simply put, since these claims are before the
12 PTAB right now, GoPro's position is is that if
13 there is a schedule and you adopt Plaintiff's
14 dates, that GoPro shouldn't be put to the burden
15 of producing sales information, particularly
16 since the fact that the PTAB instituted a review
17 is pertinent to willfulness, because obviously
18 we had an objectively reasonable basis to
19 believe we didn't infringe if the PTAB
20 instituted. So it's GoPro's position consistent
21 with everything else that in light of the PTAB
22 proceedings, GoPro shouldn't be put to that
23 burden. And particularly since during this
24 hearing Plaintiff did say that, you know,

1 there's certain of the aspects of the case they
2 wouldn't push, damages should be part and parcel
3 of that. I don't know how you peal it all off.
4 And so we were just seeking to defer that
5 burden.

6 THE COURT: Should the Plaintiff
7 not have to include his damages theory or model
8 in its first disclosure too?

9 MS. KHACHATOURIAN: That would be
10 perfectly fine by us, Your Honor, because we
11 don't think the case should move forward.

12 THE COURT: Okay. Is there
13 anything the Plaintiff wants to say on that, Ms.
14 Keller?

15 MS. KELLER: Yes, Your Honor. So
16 I think this issue is intertwined with what you
17 also see in Paragraph 8 as it relates to
18 bifurcation generally of discovery for
19 willfulness and damages. And Plaintiff's
20 position is very simple. The standard practice
21 in this Court, after a long thought out review
22 of the default standard for discovery, was to
23 include sales figures for the accused products
24 early on so that Plaintiffs can make an educated

1 decision as to proceeding in the case and also
2 to facilitate ADR in this case.

3 We don't -- let me take a step
4 back. As you heard in the argument earlier, the
5 same products are accused for the seven or eight
6 claims that will go forward, so it only makes
7 sense to proceed on a normal schedule as is
8 typical in this court as to sales figures if
9 we're going to proceed with a schedule. We
10 don't understand, quite frankly, how willful
11 infringement relates to this initial disclosure
12 of sales figures and what the basis is for
13 Defendant's argument that the two are
14 intertwined. I think the Court's general
15 process for not bifurcating at this point
16 damages and willfulness from the normal course
17 should also adhere in this case.

18 THE COURT: Okay. Thank you. The
19 second issue was the request for bifurcation,
20 which I suppose is also related to the request
21 in Subparagraph B(2). Ms. Khachatourian, is
22 there anything you want to add about why the
23 Defendant's side thinks this case is a good
24 candidate for bifurcation when it's not the norm

1 in Chief Judge Stark's cases?

2 MS. KHACHATOURIAN: Yes, Your
3 Honor. This is, in fact, an extraordinarily
4 unusual case, given all the open issues, not
5 just with the PTAB but with ownership issues,
6 license issues, who owns what. And therefore,
7 in addition to the willfulness component that we
8 discussed and the other issues I raised, I'd
9 also raise that given all the open issues, until
10 those are resolved it would make sense to
11 bifurcate so as not to put the burden onto GoPro
12 to participate in discovery that ultimately may
13 be unnecessary.

14 THE COURT: And while I have you
15 up here, why don't I ask you about what I
16 thought were the other two issues that remain,
17 which are on Page 5 of the scheduling order, a
18 dispute about requests for admission and then
19 probably more substantively, a dispute about
20 deposition hours, which I think has some bearing
21 on the issue of Contour LLC that was mentioned
22 in the letter, but is there anything you want to
23 add as to either of those two issues?

24 MS. KHACHATOURIAN: Your Honor, we

1 just think that the discovery request is
2 excessive. 45 RFA's to one party appears
3 excessive to us given the issues, particularly
4 if there are certain issues the Plaintiff said
5 they're not going to pursue while the PTAB is
6 pending. With respect to the depositions, they
7 want 70 hours of GoPro. We're just one party.
8 I mean, that's 10 depositions. It's also
9 unclear who the parties are. For example, you
10 know, CIPH, if we were to take discovery, there
11 would be some corporate formation and other
12 things we would obviously pursue, but Contour
13 LLC is the one who invented the patents,
14 produced the product and all the rest of it.
15 And then we presumably, if iON remains in the
16 case, and again that is still unclear, we are
17 going to want to depose them if they are the
18 ones now manufacturing Contour's products. And
19 so they shouldn't get the same amount of hours
20 we have. They should get less. It's excessive
21 to have 10 depositions in a simple case like
22 this with only two patents where the patents are
23 so related. I mean, that puts an extraordinary
24 burden on GoPro and its employees.

1 THE COURT: Was there some -- I
2 thought, maybe I was wrong, but I thought some
3 of the back and forth about maybe the request
4 for 70 hours was because you also intended to
5 consider Contour LLC as a party. And so the
6 idea was we think they should be treated as a
7 party and therefore we need more?

8 MS. KHACHATOURIAN: Correct. That
9 is correct. And also, you know, we obviously
10 would take depositions of prior artists and
11 other more typical third parties that CIPH would
12 not. I mean technically CIPH is a
13 non-practicing entity. They are a holding
14 company for IP assets. So the burden on
15 discovery is presumably less on them than it
16 would be on us, and therefore it needs to be
17 proportional.

18 THE COURT: As to the issue about
19 whether it's appropriate to treat Contour LLC as
20 a third party and let you guys pursue discovery
21 with Rule 45 or whether there's an argument as
22 to whether they should be treated as a party, if
23 I wasn't going to decide that issue today
24 because I don't have anything before me about

1 what the law would be on that, I can still make
2 a decision about whether or not 70 or 35 hours,
3 70 hours for both sides or 35 and 70 is
4 appropriate?

5 MS. KHACHATOURIAN: Presuming that
6 I believe in our request we stated expert and
7 third parties would be exempted, so so long as
8 those, those third parties aren't included,
9 which includes Contour LLC where we would get
10 additional time, I would agree with Your Honor.

11 THE COURT: That's not disputed,
12 is it? I believe that's not disputed.

13 MS. KHACHATOURIAN: Yeah, I don't
14 believe it is.

15 THE COURT: All right. Thank you.

16 MS. KHACHATOURIAN: Thank you,
17 Your Honor.

18 THE COURT: Is there anything the
19 Plaintiff wants to add about those two disputes,
20 that is the dispute in Subparagraph C and E?

21 MS. KELLER: Your Honor, as to the
22 request for admission in Paragraph C, the
23 dispute really is it's unclear -- and this may
24 have been just been miscommunication between the

1 parties, whether these include requests for
2 authenticity RFA's, which arguably tends to
3 drive the number up a little bit higher, which
4 is why we asked for the additional amount, I
5 think we would be comfortable splitting it in
6 the middle to be honest, Your Honor.

7 As to Paragraph E, Subpart 1, Your
8 Honor, Plaintiff's request is for the Federal
9 Rules, which is 10 depositions at seven hours a
10 piece. We don't see justification to move away
11 from that. It's practice in this Court. That's
12 what's good for the goose is good for the
13 gander, unless there's some abnormality in
14 numbers of parties on each side where there's an
15 adjustment made. But here a typical competitor
16 case, you have 35 hours for Plaintiff's
17 deposition of a Defendant and 70 seems very
18 disparate. We're obviously going to be
19 reasonable in the number of deposition hours we
20 use, but to be limited to something less than
21 the federal rules just seems extremely
22 prejudicial to the Plaintiffs.

23 THE COURT: Okay. Thank you, Ms.
24 Keller. I'll just ask the parties to, when you

1 submit the final proposed schedule, just leave
2 these four disputes open as you have and I'll
3 just -- I'll simply make decisions on the
4 proposed form itself.

5 Did I miss any other scheduling
6 related disputes that the parties are aware of?
7 I see both sides shaking their head no and a
8 chance to tell me I'm wrong. Okay. Thank you.
9 Let me ask you then, before I just turn back to
10 the issue on ADR for a minute, are there any
11 other issues that don't relate to the motions
12 which we've talked about in some detail, that
13 don't relate to schedule disputes, but that are
14 the kinds of issues where the parties would say,
15 Judge, this isn't really ripe for decision now,
16 but it's an issue that if the case moves forward
17 or when it moves forward it's going to be an
18 issue that the parties are going to be disputing
19 and it's probably a good idea to make the Court
20 aware of it now so that you're familiar with the
21 fact that this is likely to come up in the
22 future and it's a pretty important issue? Is
23 there anything like that from the Plaintiff's
24 side that we haven't already discussed today

1 that the Plaintiff would want to mention, Mr.
2 Schoenhard?

3 MR. SCHOENHARD: None of which
4 we're immediately aware, Your Honor.

5 THE COURT: Okay. We did cover a
6 lot. On the Defendant's side, is there anything
7 that falls into that category?

8 MS. KHACHATOURIAN: Nothing that I
9 haven't already discussed, Your Honor.

10 THE COURT: Okay.

11 MS. KHACHATOURIAN: Thank you.

12 MR. BLUMENFELD: Your Honor, I
13 should have raised this earlier, one scheduling
14 thing. It's a small thing. If we go forward
15 with the Plaintiff's schedule, the Markman
16 hearing is about a month later than the parties
17 had proposed and I would hope that we would be
18 free to move the briefing a little. And the
19 main reason I raise that is because we had the
20 second round of briefs due on January 6th under
21 their proposal, which isn't perfect for a lot of
22 reasons. And so if we could get the briefs in,
23 in a month before the Markman hearing, that
24 would be helpful, I think, to both sides.

1 THE COURT: Right. So the idea is
2 because we're moving the Markman back at least a
3 month from when you expected, it's not going to
4 effect the simplification issue because it's
5 actually moving it back. Just to give the
6 parties a little more breathing space around the
7 holidays, if the parties can jointly agree to
8 revised briefing dates or otherwise revised
9 claim construction dates that push things back
10 slightly because of the new Markman hearing
11 date, that's fine, just go ahead and include
12 those revised dates in what you submit to me on
13 Friday. Also if you could resolve Subparagraph
14 C, why don't you go ahead and do that so I just
15 have to make those decisions on that, that is,
16 on the issues with regard to request for
17 admission. I'll just make the decisions on the
18 remaining three issues assuming they are the
19 ones that are live.

Okay. With that said, let me just say a word about ADR. And I know some of this may depend on one, whether the case moves forward, but what I always like to do at least at the initial scheduling conference is to ask

both sides their view as to when in the history of the case is the first instance where the Plaintiff and/or the Defendant believe that the Court could actually make substantive progress with the parties in terms of discussing the issue of settlement. Sometimes parties tell me that it would probably need to happen at least after initial disclosures are completed.

Sometimes the parties say it's the kind of case where we would need to have a Markman order on disputed terms to really be able to assess merits by way of settlement. Sometimes the parties say something different. If I asked that to the Plaintiff's side, what's the first time Plaintiffs believes that progress could be made in terms of an initial call with regard to ADR?

Plaintiffs are open to resolution of this dispute at any time, frankly. I expect that given the questions that have been raised by GoPro in this case about the ownership issues, although, again, I don't believe ownership is a dispute, but the status of the license with

1 respect to iON, I would expect that it would
2 behoove the parties to wait until after that is
3 resolved before burdening the Court's resources
4 and moving forward with ADR. But at that point
5 forward the Plaintiffs are prepared to proceed
6 and would happily find a good resolution.

7 THE COURT: Okay. From the
8 Defendant's side?

9 MS. KHACHATOURIAN: Your Honor,
10 while GoPro is always open to resolution,
11 opposing counsel is correct. Until the status
12 of ownership and the remaining corporate issues
13 are resolved, GoPro doesn't see an immediate
14 benefit. They need to be speaking to the people
15 who have authority and from GoPro's perspective,
16 that's unclear right now, particularly since
17 there is a dispute between the two Plaintiffs.

18 THE COURT: Okay. All right.
19 Well, what I'll do is I won't set an initial ADR
20 call in the schedule for now. It's clear to
21 me that at least some number of case events
22 and/or party discussions have to happen before
23 we can probably make meaningful progress there.
24 I'll just tag it as a case that as we go along

1 I'll need to follow up with the parties on that
2 front at some point in the future. Okay.
3 Before I leave you, is there anything else we
4 need to take up at this time from the
5 Plaintiff's perspective?

6 MR. SCHOENHARD: No, Your Honor.

7 THE COURT: Okay. And from the
8 Defendant's perspective?

9 MS. KHACHATOURIAN: No, Your
10 Honor.

11 THE COURT: All right. Counsel
12 and out of town clients, I wish you safe
13 travels. I thank everybody for your
14 presentations today. Look forward to getting a
15 revised schedule on Friday. I'll issue a short
16 oral order with respect to the additional
17 submissions and we'll make a decision about the
18 entry of a schedule in short order. Okay.
19 Thank you. Court will stand in recess.

20 (End at 4:04 p.m.)

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1 State of Delaware)
2 New Castle County)

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5 | CERTIFICATE OF REPORTER

6

I, Stacy M. Ingram, Certified Court Reporter
and Notary Public, do hereby certify that the
foregoing record, Pages 1 to 123 inclusive, is a true
and accurate transcript of my stenographic notes
taken on April 19, 2016, in the above-captioned
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13

14

15 hand and seal this 19th day of April 2016, at
16 Wilmington.

17

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/s/ Stacy M. Ingram

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